

No. 8587

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CHARLES LUX ET AL.,

APPELLANTS,

VS.

J. B. HAGGIN ET AL.,

RESPONDENTS.

PETITION FOR A RE-HEARING.

GARBER, THORNTON & BISHOP,

Counsel for Respondents.

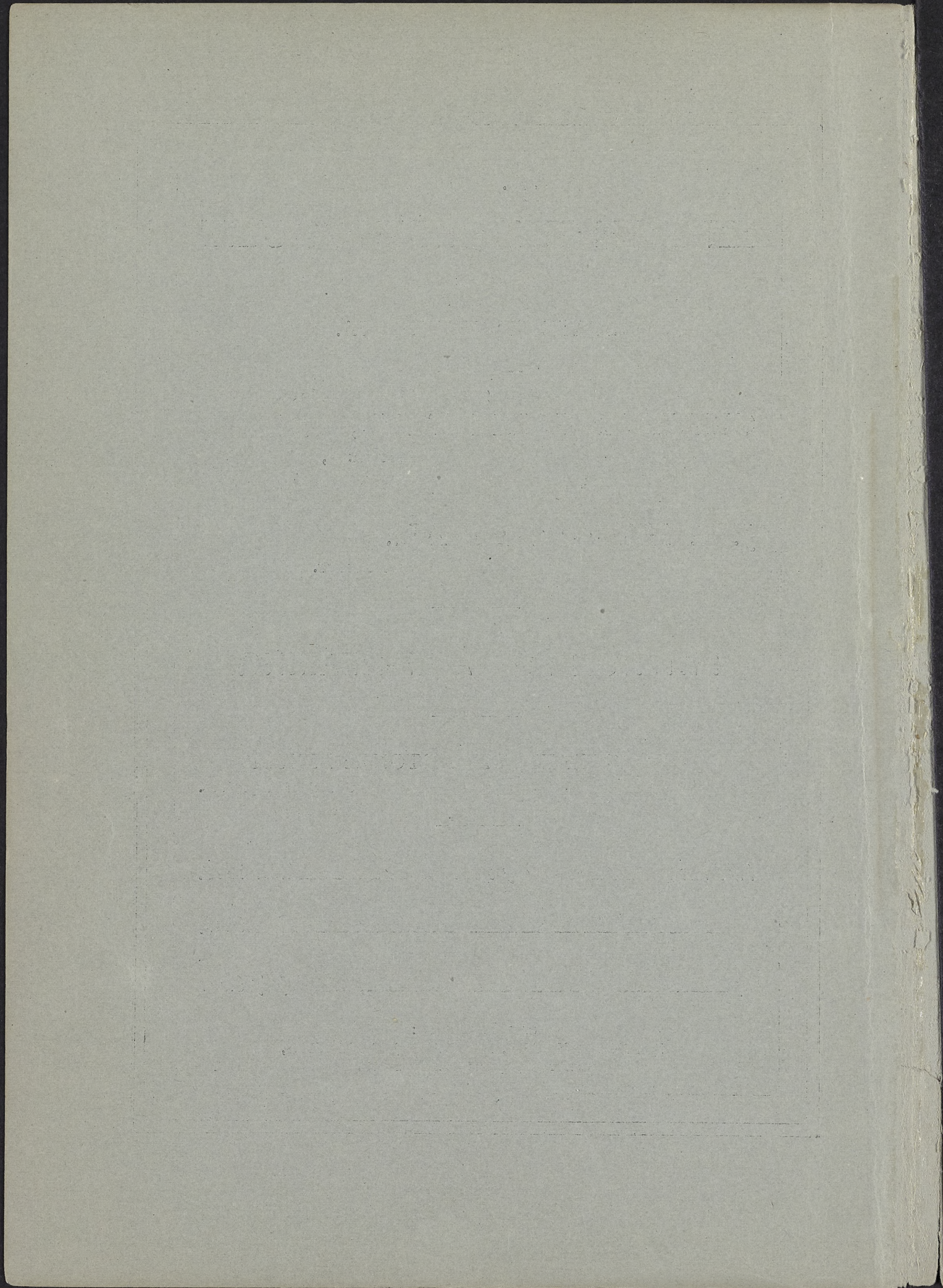
Filed this 15th day of May A. D. 1886.

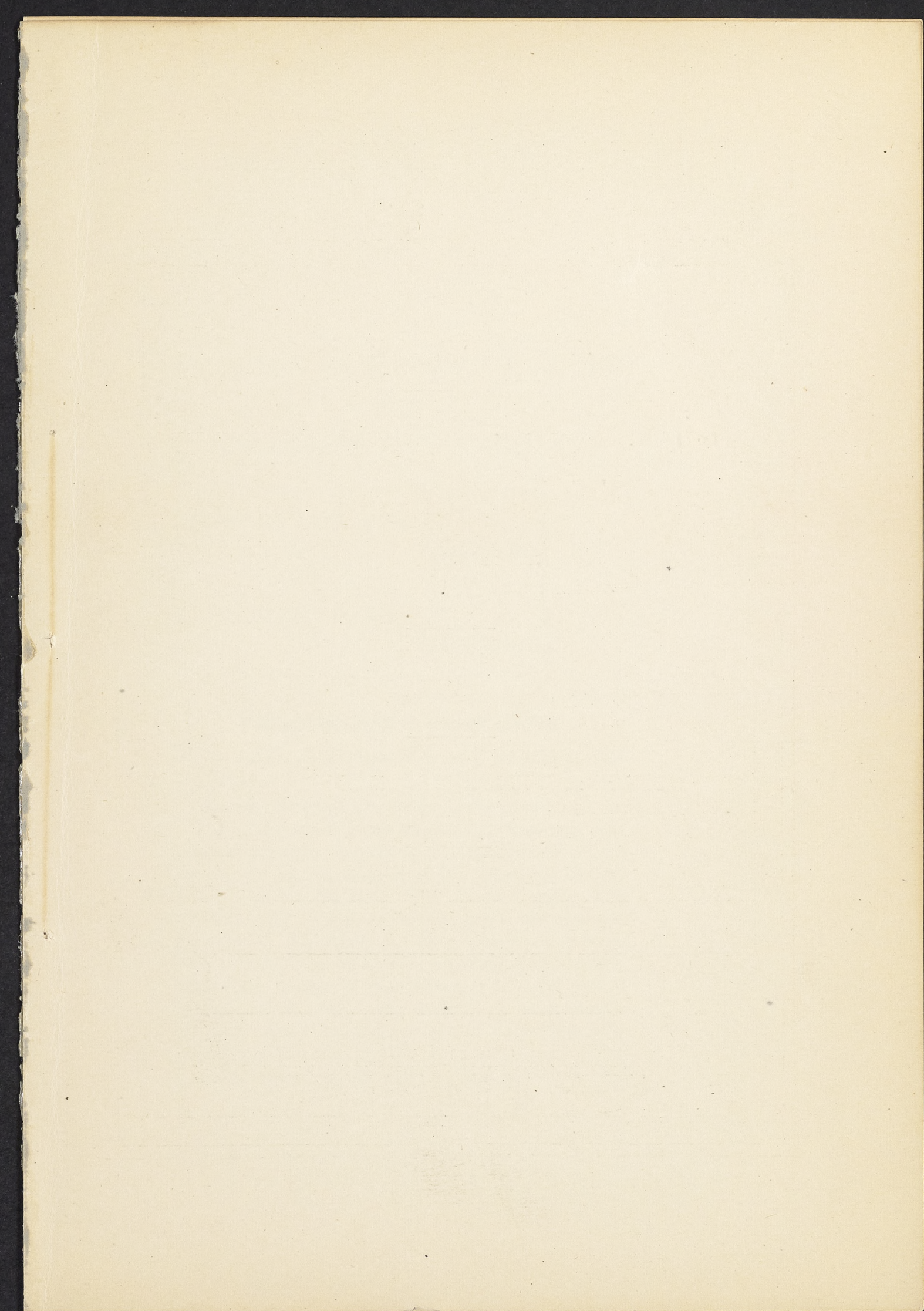
J. D. Spencer Clerk,

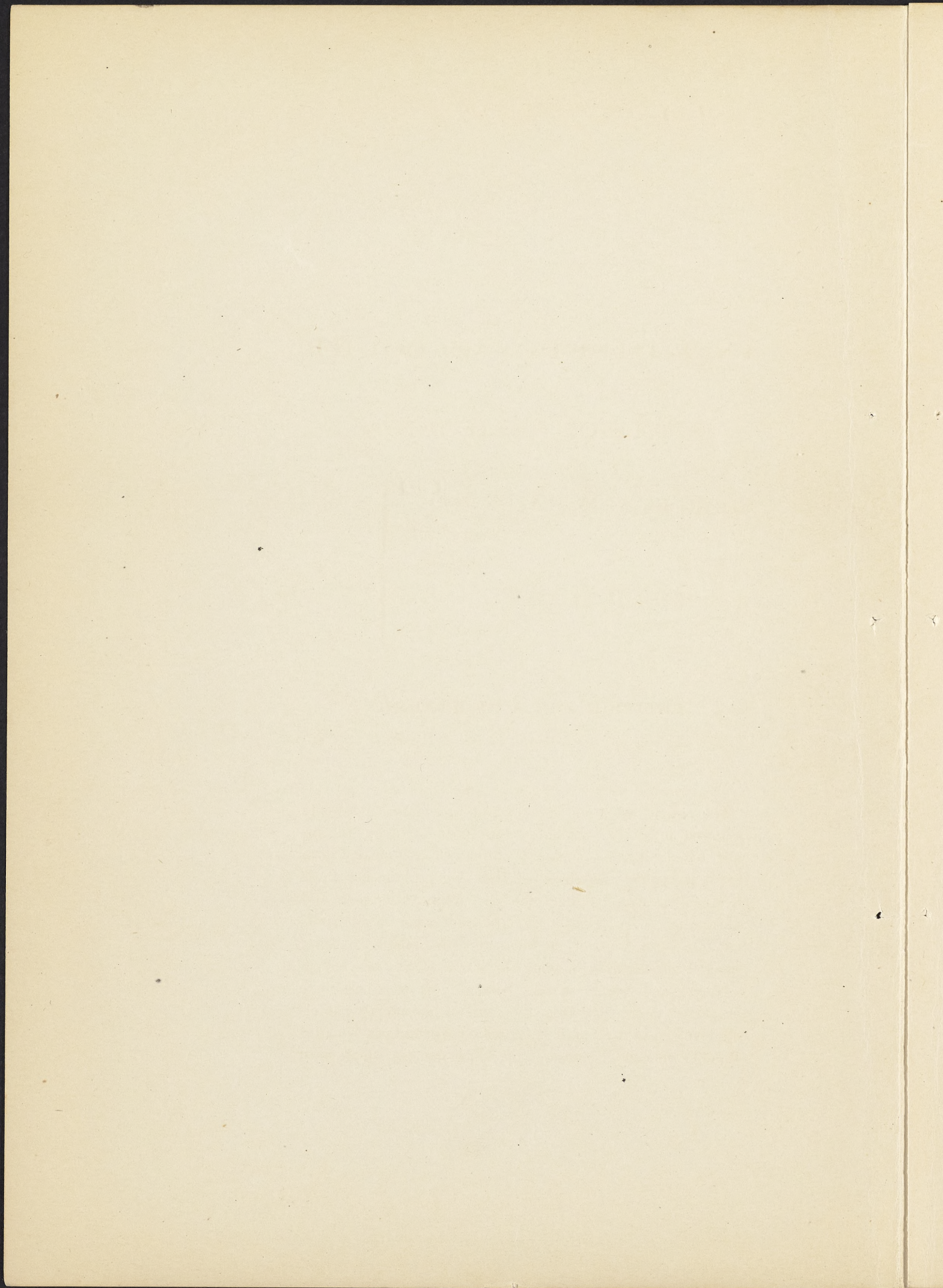
By Frank Meyer Deputy Clerk

SAN FRANCISCO:

BACON & COMPANY, BOOK AND JOB PRINTERS,
Corner of Clay and Sansome Streets.







IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

CHARLES LUX ET AL.,	}
Appellants,	
vs.	
J. B. HAGGIN ET AL.,	}
Respondents.	

PETITION FOR A RE-HEARING.

To the Justices of the Supreme Court of the State of California:

We respectfully ask a re-hearing in this cause.

The patient attention and anxious consideration already bestowed upon the momentous questions involved in this case by the learned members of this Court, clearly show that it is not the disposition of the Court to decide those questions hastily, or without the most ample discussion and examination. And rightly so. It is conceded on all hands that this cause is one of the most important which has ever engaged the attention of your Honors, or of any of your illustrious predecessors in this tribunal. It is important to the parties themselves, from the value of the property interests involved in it; but it is far more important, as a matter of public concern, because of the consequences which must

flow from it to the people of the whole State, if the decision here to be made shall finally determine the vexed question of riparian rights in California. It is eminently proper, therefore, that the utmost care should be taken, first, to ascertain whether or not the case is such as necessarily to call for a decision of that question, and, if so, then to examine the question itself in every possible point of view before coming to a conclusion. We confidently believe that, so long as there is any branch of the argument upon which the parties have not been ^{fully} heard, the Court will not withhold an opportunity for further discussion. It is in that belief that we ask a re-hearing. Notwithstanding the extended discussion which the case has already undergone, we perceive that the respondents have not yet succeeded in exhausting the argument on their side, since the case has been made to turn upon a proposition never argued or even mooted in the case in either Court, and first advanced in the opinion.

The elaborate and exhaustive opinion of Mr. Justice McKinstry, concurred in by the majority of the Court, whether it shall stand as the final judgment in the cause or not, certainly constitutes a contribution of inestimable value to the discussion of the important questions involved in the controversy. It is the most elaborate presentation of the arguments in favor of the prevalence of the common law doctrine of riparian rights in California which has yet been made, or which will probably ever be made. It is rich in original views, views not hitherto presented or examined, not only upon that subject, but also upon other points in the case. But that very fact, we respectfully submit, strongly suggests not only the propriety but the justice of permitting a re-argument, in order that the respondents may have an opportunity to meet, if they can, the views thus for the first time, as we think, presented in this or in any other Court. If we may say so without presumption, we hope to be able to show, as to some of the original propositions thus advanced in the opinion, and adopted as grounds of decision, that they ought not to be admitted to control the case; and as to others, we are confident

that, if correctly applied to the facts as they appear in the record, they must inevitably result in an affirmance. We are certain, for instance, that this Court would not intentionally base a reversal of this judgment here upon a mistake of fact; and yet we think we can show clearly, and beyond the shadow of a doubt, that the ruling upon which the whole decision here rests is based upon such a mistake.

Without troubling the Court with any further general observations upon the importance of the case, and the propriety of a careful and exhaustive discussion of it before a final decision is arrived at, and upon the justice of allowing the respondents to be heard upon every new view of the case before it shall be adopted as controlling, we proceed to an examination of certain particular propositions laid down in the prevailing opinion.

I.

CORRECTNESS OF RULINGS AS TO PLAINTIFFS' REBUTTAL THE FIRST QUESTION IN THE CASE.

It is obvious that the very first question to be determined in this case is as to the existence of the alleged water course through Buena Vista Slough, and the plaintiffs' ownership of lands thereon when the defendants made their appropriation. Without proof of a watercourse at the date of the appropriation, the question as to whether or not the modern English common law doctrine of riparian rights is the law of California does not arise here. And we take it for granted, that until the question necessarily does arise, so as to render the determination of it unavoidable, the Court will not be anxious to decide it. It is too grave a question to warrant any Court in unnecessarily assuming the responsibility of determining it. It is no light thing to lay down a rule of law which may, in a single breath, destroy the value of millions of dollars worth of property, and which will undoubtedly affect the prosperity of this young commonwealth, for weal or woe, for

generations to come ; and prudent Judges may well hesitate to undertake, unless absolutely necessary, so weighty a task. We believe that the question of riparian rights does not necessarily arise upon this record, and it certainly does not, unless the Court below erred in rejecting the plaintiffs' alleged rebutting evidence on the question of the watercourse. For this reason we address ourselves first to the alleged errors in rejecting the testimony offered in rebuttal.

II.

REBUTTAL AS TO THE EXISTENCE OF A WATERCOURSE.

It is admitted in the opinion of the majority of the Court that, unless there was error in rejecting the alleged rebutting evidence as to the existence of a watercourse through the plaintiffs' swamp, the judgment must be affirmed, however, this Court may resolve the other questions in the case. It is insisted, however, that there was error in rejecting part of that evidence. The ground upon which this is said to have been error is, that the evidence introduced by the defendants as to the non-existence of a watercourse after the suit was commenced tended to establish the affirmative proposition that the channel, assuming that there had ever been one, had ceased to exist after suit brought ; that this, if shown, would have defeated the right to an injunction, since the injury must be continuing to warrant an injunction ; and that the plaintiffs were not bound to anticipate any such defense, but were at liberty to meet it by way of rebuttal after the defendants had rested. Waiving for the present, the question as to whether or not this Court, as an appellate tribunal, would be warranted in assuming, in order to sustain the evidence offered, and to convict the Court below of error in rejecting it, a ground never advanced or hinted at either in that Court or in this, until now, we propose to show that the proposition is based upon a *misapprehension of*

the testimony, and that, admitting the positions taken on this point in the opinion to be good law, the alleged rebuttal was rightly rejected.

But first let us inquire what is the general rule governing the admission of rebuttal evidence, as matter of right.

1. *Common Law Rule as to Rebuttal.*

The opinion of the majority of the Court quotes from Mr. Crosswell's note to 1 Greenl. Ev. (14 ed.) Sec. 469, the following as the rule on this subject, which is sustained by the preponderance of authority, and which obtains in California. "At common law the *plaintiff puts in his whole evidence upon every point which he opens*, and the defendant then puts in his entire case, and *the plaintiff's reply is limited to new points first opened by defendant.*" We are perfectly content with that rule, and all we ask is that it shall be fairly applied to this case. That it is the rule of the common law admits of no question. The authorities sustaining it, are collected in our former petition for a re-hearing and in the various briefs for the respondents. The opinion refers to and quotes from some of them. Being the rule of the common law, it is, of course, the rule in California, under the statute to which we have been so often referred, adopting the common law as a "rule of decision," unless it has been changed by legislation. But it has not been changed. On the contrary the statutory rule is in accordance with it. Code of Civ. Proc. Sec. 607. The rule is, then, that a plaintiff cannot insist upon the admission of evidence in rebuttal as a matter of right, unless it is addressed to "new points first opened by defendant." Evidence which merely contradicts the testimony on the other side, unless addressed to such "new point," is not rebuttal. "Rebutting evidence * * * means not merely evidence which contradicts the witnesses on the opposite side, and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove. *Marshall v. Davies*, 78 N. Y.

414; S. C. 58 How. Pr. 231; *Silverman v. Foreman*, 3 E. D. Smith, 322; Baylies' Trial Practice, 172.

2.—*Alleged rebuttal as to channel, not on a "new point first opened by defendants," and therefore inadmissible, upon the same grounds as that which the Court held to have been properly rejected.*

The Court hold that the ruling of the Court below, rejecting the evidence attempted to be offered in rebuttal as to the existence of a channel at the "De Weber Road Crossing" before suit, was not error, because "the plaintiffs had already given evidence [in chief] that at the time, and subsequent to the time mentioned by defendants' witnesses, the De Weber road did cross a channel," and hence the point was not a "new" one "first opened by the defendants." It is assumed, on the other hand, throughout the opinion, so far as it relates to this matter, that the question as to the non-existence of a channel after suit brought *was* a "new point first opened by the defendants." It necessarily follows, therefore, that if the Court can be satisfied that the fact was otherwise, and that the plaintiffs themselves "first opened" that point, and introduced in chief the testimony of a number of witnesses to show the existence of a channel throughout the length of the alleged watercourse, not only after the commencement of the suit, but while the trial was actually in progress, and down to or about the very time as to which the defendant's witnesses testified, then the same rule will be applied as was applied respecting the "De Weber Road Crossing." That such is the fact is unquestionable. The subject of the existence of a channel after the suit was brought, and during the trial, was gone into with the utmost fullness, and particularity in the plaintiffs' case in chief, by evidence of precisely the same character and tenor as that offered in rebuttal. A brief review of the testimony in the transcript will make this apparent.

The action was commenced May 14, 1879. On April 19,

1881, Still, a witness for the plaintiffs, testified in chief that he was up and down the slough, off and on, throughout the summer of 1879, and found water only in holes; that from the time he went there in 1874 up to the *close of* 1880 he should think he had *crossed the slough* a thousand times, and had crossed it on *every quarter section* in the swamp; *and that he found a water channel all of the distance between Buena Vista and Tulare Lakes.* (Transcript, vol. 2, p. 193.) And again he says *he was there every month in the year 1880, and there was lots of water there then.* (Id. 201.)

Lewis, another witness for the plaintiff, testified on direct examination, that he was on the slough at a number of places in 1879; that he had a pump running there at the Tule House, near Tulare Lake; that he commenced pumping on May 12, 1879, and continued until February, 1880; that he was up and down the slough in 1879, as far as Ebberly's or Dover's Camp, (which is in Sec. 1, T. 29 S., R. 22 E.); that he was on the slough all the year 1880, off and on, working there with stock, between the head of Tulare Lake, and the lower end of Weed Island, (in Sec's 23 and 25, T. 29, S., R. 23 E.). He describes the condition of the channel since he has known it, from Goose Lake to Tulare Lake, giving its width, depth, the direction of the current in it, etc. He says further that he has been as high up the channel as the Tracy Crossing, and has crossed it back and forth; that he has crossed the channel above Goose Lake, at a great many different points; that he presumes he *has crossed it several thousand times, and "at every section of land there is between Goose Lake and Tulare Lake, on every half section and quarter section"*; that he has noticed the channel whenever he has crossed it, and that it "*seemed to be a deep channel, confined channel,*" a "*well confined channel*" where he crossed it. (Id. 263-265.) And on cross-examination he testifies to being on the slough in 1881, six miles above the Tule House, and finding the "banks pretty full." (Id. 272.)

Racine, also a witness for the plaintiffs, testifies that he was on the slough in 1879, 1880, and January, 1881; that in 1879 and 1880, the water was standing in holes; that there was no water below the Tule House in April, 1880, but there was water further up; that he crossed to Broder and Weed Islands and had to swim. He says that he cannot tell at how many points he has crossed the slough since he has been there, but he thinks he has done so on nearly every section; that the channel from Buena Vista Lake to Tulare Lake, through the swamp, "*is a well defined channel*"; that he cannot say how deep it is on an average; that "in places where there are steep banks, such as there is from Buena Vista Lake down to Norton's Camp, or at the Wible Camp, some places there, it would be eight or ten feet deep, the banks, and in some places less. Some places below, before we got to Weed Island, was very steep banks, eight or ten feet high. Then you come to the banks that are sloping banks, and the water would not be over five or six feet. In some places it would be fifteen or twenty feet deep. It runs on in that way clear through." (Id. 314, 315.) Again he says, that the east channel from opposite Goose Lake to Tulare Lake is of an average depth of from three to ten feet, being in places fifteen feet; and that it "is from eighty to one hundred feet wide," and that the West channel is, in places, larger, but averages about the same. (Id. 316.)

Dover, another of the plaintiffs' witnesses, was living on the slough at the time of the trial, and had been since 1876. He testifies that he has run his hogs over the swamp for 15 or 20 miles both ways above and below his camp, and is familiar with the sloughs and channels. In some places he says "there is * * a fine, big slough, and at other places it is not very deep." (Id. 316.) He thinks that over the distance where he runs his hogs, the average width of the slough is from 60 to 80 feet, and the average depth between 3 and 10 feet. He says that he is in the swamp every day when he is at home, and that "if there is a spot there that" he has "not been on" he "don't know it." He describes

how the water will run when turned into the slough ; that in places where the banks are low the water will overflow them, etc. He speaks of a shallow spot between the bridge and Tracy's Crossing coming down from the Alejandro place, and another coming out of Buena Vista Lake. (Id. 317.) He testifies also, in answer to a direct question of the plaintiffs' counsel, to the "condition of the water there in 1879." (Id. 318.)

Pensinger, another witness for the plaintiff, testifies to having gone down the slough in a scow from Tracy's crossing for 6 or 8 miles in 1872, and having been unable to take the scow back on account of the strength of the current. He testifies also to having crossed the slough frequently since that time, and being compelled to swim it, and on cross-examination he says he has crossed it every year from 1875 to 1880. (Id. 319, 320.)

The testimony of the plaintiffs' witness, Rogers, is worthy of attentive consideration with respect to the point now under discussion. He testifies to having been upon the slough at Wible's camp in 1880, and to having crossed it there and below, back and forth. *He says he was there again in April, 1881, the very month in which he was testifying, and also the very month to which defendant's testimony, which it was afterwards sought to rebut, was directed, and that he went down the slough on that occasion from Wible's camp nearly to Tulare Lake, that is to say almost the entire length of the alleged water-course.* He says *there was a big slough down there* with considerable water in it, but no running water, but that there was running water at Wible's camp. (Id. 325.) Again, he says that "during these numerous years" the slough was from 60 to 90 feet wide, and from 5 to 6 feet deep on an average. (Id. 326.) On cross-examination he testifies that he does not think the slough would average a depth of 5 to 6 feet from Wible's camp to Tulare Lake, but that it would do so from Goose Lake to the Tule House. *He says he knows there was a channel* from seeing the water running in it, and also from observing the marks of

a channel when the water was out, and that he traced a continuous channel from Goose Lake to the Tule House. (Id. 327, 328.)

Another of plaintiffs' witnesses, Barnes, testifies to having been upon the slough in 1879 and 1880, going, in the latter year, as far down as Dixon's, and about Wible's camp. He describes the water, the channel, etc., and says that there was a "well-defined channel" down to the head of Weed Island, where the channel was choked up by drift in 1868, and that from the head of Weed Island to Goose Lake he has found the channel nearly every place he crossed it; that he never followed the channel directly down to Goose Lake, but has struck the channel at different places. (Id. 335-337.)

Another witness for the plaintiffs, whose testimony deserves special attention in this connection, is Milton Norton, because he testifies as to the existence of a channel within a few days after the time subsequently deposed to by the defendants' witnesses, and upon the same part of the slough. He testified on April 25, 1881, that on the Thursday previous he was along the slough between Buena Vista Lake and the Bonestell House, Id. 420; that he followed the slough up from the Bonestell House a distance of some eight miles, to where he lived; that the water was running in the slough about three feet deep, without overflowing at any point; that he kept right along by the side of the slough *all the time*; that *the channel was in the same condition as when he first saw it* (which was in 1875, as he testifies on the first page of his deposition); that *on the same day* (the Thursday previous to testifying) *he followed the slough north about fifteen miles from the Bonestell House*; that *there was a current below the house* for about a mile; that where the current ceased the *slough was not very deep*, but about twenty feet from there it was a foot deep and ten feet wide, and a hundred yards away it was about one hundred feet wide; that the current ceased apparently, because there was not head enough to force it farther; that going on down, the next place they found water was about four miles below Dover's

Camp, at the break in the canal; that *along where it was dry the slough was one hundred and twenty-five feet wide and three to four feet deep on an average.* (Id. 421, 422.) The same witness also testified that *in February, 1881, he saw the water running down the slough channel between the Bonestell House and the break in the canal, half a side deep to a horse, in places, and three feet deep in others, without any overflowing of its banks.* He further stated that on the Thursday as to which he had already testified, they followed the road from the break in the canal to about a mile below the Adobe Holes, where they struck the slough and found a stream of water, which they followed about two miles, and that at that point the channel was about one hundred feet wide. (Id. 422.) *He testified also, to having, on one occasion, gone in a boat from Wible's Camp, about three and one-half miles north on the slough.* Returning to the time of his going down the slough, in February, 1881, he said he followed it down from his house to some distance below Dover's Camp, and *he described the channel with considerable particularity.* (Id. 424, 425.) *On cross-examination, also, he gave a further description of the channel.* (Id. 427, et seq.)

Burgan, an employed of one of the plaintiffs, also testified as to the existence of a channel and watercourse after suit brought. He stated that he was on and along the slough between Tracy's Crossing and Tulare Lake, caring for cattle, working pumps &c., in 1879 and 1880, and as late as January, 1881. He stated also that the water did not run below Dover's Camp in 1880. In answer to a question as to "what is the average size of that slough, the main slough, from Tracy's Crossing to the Tule House?" he testified that "it would average 80 or 100 feet" and that as a rule the water would run about 6 feet deep before it would overflow, while in the shallowest place in the channel it would run two feet. He testified further that a man could, in his opinion, travel in the channel from Salt Slough to the Tule House. (Id. 435-437.)

The plaintiffs' most important witness upon the point we are now considering was Wible, who seems to have been a sort of *factotum* for them, in and out of Court, and who testified in their behalf with commendable industry and alacrity. He testifies that he lives at Wible's Camp, and has lived there since 1876; that *he has been down the slough, from the Tracy Crossing to the Bonestell House, every year since he has been there*; and he describes the channel between those points as a "deep channel," etc. (Id. 440.) He says that *he was on the slough at the Bonestell House on April 24, 1881, only two days before giving his testimony, and that he went from there right up the channel to Wible's Camp, about twelve or fourteen miles and he describes the channel and the water, as they then were, minutely.* (Id. 441, et seq.) On the same day, and "since then," he testifies that he has been on and crossed the Western channel, west of Weed Island; that the first he drove on to the bank of the channel, was near the Adobe Holes, about eight miles below Dover's Camp; that *there was water to the depth of five or six feet right in the Adobe Holes—two feet and a half more water than there was two weeks ago. * * * Plenty of water there, and running north*"; that he drove right on to the edge of the bank at the Adobe Holes, and found "*lots of water there, wide and deep*"; that from there he went to the channel at the Adobe Chimney Camp, or Crocker's Camp (on Sec. 20, T. 27 S., R. 22 E), about four miles below the Adobe Holes; that the channel was dry there and he followed it somewhat further; that he then struck the channel at Epperly's Camp, three or four miles from the Crocker Camp; that he "*followed the channel right on from there,*" and that "*it was nice driving right in the channel,*" and he must have followed it three or four miles; that the channel there would average one hundred feet wide, and from four or

five to ten feet deep; that he took the channel again between sections twenty-four and fifteen (T. 26 S., R. 21 E.), and followed it three or four miles to a point very nearly opposite the Tule House; "it was not all the way dry; *there was a big, deep channel there,*" and he "don't know how much water there was standing in it; there was no running water"; that "*he followed the channel,*" where he found no running water, "*three or four miles, down to section thirty-six, T. 25 S., R. 21 E.*" and from there went to the Tule House; that the channel that ran from the West Channel to the Tule House was dry, and was from fifty to seventy-five feet wide *when he made any note of it*; that "*it was a deep, big channel*" at its intersection; that at the Tule House he found the Eastern Channel and followed it up; drove along it about half a mile from the Tule House, and then "*drove right into the bottom of it,*" and drove along it for two hours, or about twelve miles; that it was "*a very nice, even channel,*" averaging seventy-five or one hundred feet in width, and from three and a half to four feet deep, until he struck water, which was in Sec. 33, T. 26 S., R. 22 E.; that he kept in the channel all the time; that the first water he came to was clear and running rapidly; that *he drove right along the water until he struck the channel that came in from the Western Channel,* and crossed that and *followed right on up the channel* to the south end of Sec. 27, T. 27 S., R. 22 E.; that he kept along the water, keeping the water to the east of him, as he drove up to where the channel came together, in about Sec. 28, T. 27 S., R. 22 E.; that he drove up the slough where the running water was about four hours, after he struck the running water; that he found water coming in from the west, at Sec. 4, T. 28 S., R. 22 E.; that he rode along the slough fifteen or sixteen miles before he found any water outside of the banks from the slough. (Id. 443-448.) The witness describes the water and

the channel all along the route of his journey very fully and particularly. On cross-examination, he again goes over the subject, and testifies to the examination of the slough and channel on the day referred to—April 24, 1881. He says that he followed the channel about twelve miles from Bonestell's to Wible's Camp, and found water running in the channel the whole way, without overflowing, and that there was "*one continuous channel*" the entire distance.

From Sec. 4, on T. 28, before mentioned, he testifies that there is a "*well-defined channel * * * clear down to Tulare Lake,*" which will carry two feet depth of water without overflowing. (Id. 489.) He minutely describes the channel at Sec. 4. (Id. 490.) After examining the channel from Bonestell's to Wible's Camp on the day referred to, he says that he went down to Dover's Camp, on Sec. 1, T. 29 S., R. 22 E., and on the next morning started down on the west side of the slough, down the road and along the canal, crossing the water at the break from the canal somewhere on Sec. 16, T. 28 S., R. 22 E., and going right on to the end of the canal; that he then drove down the road to Sec. 20, T. 27 S., R. 22, Crockers's Camp, where he struck and examined the channel, and examined it also at the Adobe Holes. He gives a description of the channel at and between those points. (Id. 491 *et seq.*) From the Adobe Holes he says he went to Sec. 33, along the road, and struck the channel, the Western channel, again, and from that he went along the road to Sec. 13, T. 26 S., R. 21 E., where he drove right through the bank of the channel; that he then went right on the banks of the main channel north through Secs. 12 and 1 into Sec. 36; that then he went from Sec. 36 across Secs. 31 and 32, and struck the channel again, the Eastern channel, crossed the channel on Sec. 32, drove up the East bank, and went to the Tule House. He gives a full description of the condition of the channel

and water at all these points. So he testifies, with great particularity, as to the channel and the water along the entire route traveled on that day, as to which he had previously testified on his direct examination. (Id. 494-502, 513-517.) It would extend this petition to an immoderate length, to attempt to give in detail his testimony on that subject.

Epperly, also a witness for the plaintiffs, testifies that after having gone away, he returned and located on the slough near the Tule House, in October or November, 1878, and remained there until the last days of April, 1880. He says that during that period he was "working" his hogs all along the slough, from the Adobe Holes down to the Tule House, and that he was "on both sides of the swamp and all through in different directions." (Id. 546.) He then went, he says, to Dover's Camp and remained there from April, 1880, "to the present time," April 27, 1881. (Id. 547.) He further testifies that since he went to Dover's camp, he has "worked" his hogs "from about the lower end of Weed Island, about nine miles down in that swamp there"; that he has been in the slough south of the north end of Weed Island, that is to say between Weed Island and Buena Vista Lake, "fifty times, maybe more"; and that *there has been no change in the channel since he "first knew it in 1873, to the present time," except at a certain drift pile of which he speaks. He describes the channel from the Bonestell House to the Button Willow, and from the Button Willow to Dover's Camp. He says it is "a well defined channel most all the way"; that two feet and a half of water will run in it without overflowing, except at one point where it spreads out about fifty yards, and that he has crossed the channel between the Button Willow and Dover's Camp, "not less than a thousand times" at almost every point where it could be crossed at all.* (Id. 549-552.)

It is thus seen that the plaintiffs adopted the theory that,

in order to obtain an injunction, they must show the existence of a watercourse, not only at the date of, but also subsequent to the commencement of the action; and in their case in chief went fully into the question of the existence and condition of the channel of the alleged watercourse after the commencement of the action, while the trial was going on, and down to the very time when the witnesses were testifying. Still and Racine undertake to testify to the existence of a channel long after the action, all the way from Buena Vista Lake to Tulare Lake. Lewis and Burgan testify to a channel from Tracy's Crossing to Tulare Lake. Pensinger also speaks of his knowledge of a channel from above Tracy's Crossing. Rogers and Wible say they went down the slough from Wible's camp to the vicinity of Tulare Lake in the latter part of April, 1881, a few days before their testimony was given, and both affirm the existence of a channel. Wible, it is evident from the whole tenor of his testimony, went there for the very purpose of hunting up a continuous channel in the interest of the plaintiffs. He professes to have made a minute examination of the channel continuously at several points, as, for instance, from his camp to Bonestell's, and in the vicinity of Dover's Camp and the Tule House. Norton was also on the channel in April, 1881, and claims to have followed it from Buena Vista Lake to four miles below Dover's Camp. Dover, a resident on the slough, professes acquaintance with every spot on the alleged channel for a distance of thirty or forty miles above and below his camp. Epperly testifies to similar minute knowledge of the slough and channel, from having "worked" his hogs along it from the lower end of Weed Island to the Tule House, and his testimony also comes down to April, 1881. Barnes testifies to the existence of a channel, since suit was brought, from the head of Weed Island to Goose Lake. It is apparent, therefore, that this testimony covers every spot at which the defendants' witnesses subsequently testified to having found no channel at about the same time. There was not a point at which the defendants' witnesses stated that they crossed

the slough without finding a channel after suit, where some of the plaintiff's witnesses had not already testified that there *was* a channel within the same period. There was no place, for instance, where the witnesses Macmurdo and Fillebrown said they found no channel, after the commencement of the action, where several witnesses for the plaintiffs had not already sworn that a channel existed within a few days of that very time. The cross-section made by Macmurdo and Fillebrown through Sections 10, 9, 8, 7, of T. 29 S., R. 23 E., in April, 1881, when they said they found no channel and only an isolated pool, necessarily traversed a line along which Messrs. Rogers, Norton, Epperly, Wible and Dover had testified for the plaintiffs that there was a channel at about the same time. If the pool or pond was part of the alleged channel, the plaintiffs' witnesses had already testified respecting it. If it was not, its existence or non-existence was wholly immaterial to the plaintiffs' case. At the point where the plaintiffs sought to prove, in rebuttal, that certain witnesses had gone in a boat within thirty days before June 1st, (from Wible's to Bonestell's) Wible and others had already testified to having passed along and found a continuous channel not far from the same time.

Now, upon this view of the evidence, how can it be claimed that the question of the existence of a channel after the commencement of the action was "first opened" by the defendants, so as to permit rebuttal by the plaintiffs on that point as matter of right? Not only was the question "first opened" by the plaintiffs, but they went into it thoroughly. They undertook to prove a continuous, unbroken channel through their swamp from end to end, not only at the commencement of the action, but also at the time of the trial. If they failed to prove it, as they certainly did, it was simply because their evidence was not strong enough. If any of their witnesses testified from insufficient knowledge, and undertook to swear that there was a continuous channel after action brought, without having examined it and traced it at every point, it was their own fault. What excuse can there

be, then, for allowing them, as a matter of right, to go into that subject again in rebuttal? The majority of the Court say, respecting the plaintiffs' general right to rebut evidence as to the non-existence of a channel at particular points in the swamp, "Assuming, as claimed by plaintiffs' counsel, that some of their witnesses pursued the alleged slough throughout its entire length, viewing each and every portion of it, it would be difficult to say on what principle the plaintiffs could demand the absolute right, by way of reply, to contradict the declarations of witnesses for the defendants, that, at or about the times when the plaintiffs' witnesses had stated there was a channel from Buena Vista Lake to a point below the plaintiffs' lands, there was in places no channel between the lake and that point." This suggestion is apt and sound, and admits of no answer; and it applies to the whole of the attempted rebuttal as to the existence of a channel at certain points after suit, the plaintiffs having introduced numerous witnesses in chief to show that they had traced or knew of a continuous channel at the time along the line including these points. The defendants' evidence on that point was in reply to that of the plaintiffs. The defendants' witnesses who testified as to the non-existence of a channel at certain points after the commencement of the action, were merely rebutting testimony previously introduced by the plaintiffs. We insist, therefore, that the plaintiffs had no right to rebut that rebuttal. The testimony offered for that purpose was clearly merely cumulative of the testimony previously introduced by the plaintiffs. The same rule that excludes the attempted rebuttal as to the "De Weber Road Crossing," must exclude this also.

Conceding that the defendants could have defeated the action by showing that, although there might have been a channel at the time of filing the complaint, it had afterwards ceased to exist through natural causes, it was not an affirmative defense. How can a defense that a thing does *not* exist, which the plaintiff affirms *does* exist, be an affirmative defense? The plaintiffs claimed that there was a watercourse,

and that they owned land upon it ; and from the nature of the remedy sought, they affirmed the continued existence of that watercourse at the time of the trial. The burden was upon them throughout. They were bound to prove the existence of a continuous watercourse ; of a watercourse uninterrupted at any point, down to the day of trial, or they could not recover. They could not rest with proof that there was, or had been, a watercourse with a defined channel in spots. A series of short, broken channels cannot constitute the bed of a stream. Conceding that the Court might presume from the existence of a defined channel at particular points that it existed at an intermediate point, in the absence of evidence to the contrary, and that a channel having once existed continued to exist ; still the presumption was merely evidence in favor of the plaintiffs, and the defendants were at liberty to rebut it. If they did rebut it by showing that there was no channel at particular points, either before or after suit brought, they were simply proving a negative, and the defense was necessarily negative. The burden of proof could not be shifted to them by their mere denial of the claim and evidence of the plaintiffs, as to the existence of a watercourse at all points, and therefore at every point.

But even if the defense that there was no watercourse after the suit was brought, whether it existed before or not, was an affirmative defense, which the defendants had the burden of proving, the plaintiffs, as the foregoing *resumé* of the testimony on that point shows, assumed the burden of proving the contrary. They undertook to anticipate the defense, if it was a defense ; and having "first opened" that question, were bound to exhaust their evidence on that point ; and if they failed to do so, they could not claim the right to bring in the residue of their testimony as rebuttal.

"It is stated in the leading opinion, that the Court is not aware that the English rule, which, at one time prohibited a plaintiff, in case he gave any evidence tending to negative an affirmative defense, in the first instance, from giving

further like evidence in reply, was ever enforced in this country or in equity." We respectfully submit, however, that even without any express authority upon this point, the rule referred to, which is beyond doubt, the rule of the common law, must prevail in a State which has adopted the "English common law" as its "rule of decision," unless it can be affirmatively shown that the rule has been changed, or is inapplicable. But there is express authority, to the effect that the rule does prevail, both in this State and in other States, and if there is any authority to the contrary we have not discovered it. The rule is distinctly laid down in *Casey vs. Le Roy*, 38 Cal. 697, 698, that if the plaintiff anticipates a defense of the defendant in his case in chief, he must introduce all his evidence on that point then; and that failing to do so, he cannot claim the right to introduce additional evidence in rebuttal. The case was an action of *assumpsit* for the value of certain work and labor, and the defense was, that the work was done in part performance of a certain contract. The plaintiff went into this defense by anticipation in his case in chief, and introduced evidence to justify the non-performance of the entire contract. The defendant then introduced his evidence on that point, and the plaintiff claimed the right to go into the matter again in rebuttal; but the Supreme Court held that he could not do so except in the discretion of the trial Court. "Having elected to anticipate the defendant's case at the opening, and to rebut it in advance, the plaintiff should have introduced all his evidence upon that head then. Having adopted that course, further evidence of the same character could not be considered as rebutting, but merely as cumulative; and in its discretion, the Court might well decline to receive it at the time it was offered."

Certainly, the Court below had a right to follow this rule. Similar doctrine is emphatically laid down in *York vs. Pease*, 2 Gray, 282, 283 *et seq.*, which was an action for slander. The defense was that the communication was privileged, and the plaintiff having anticipated it in his case in

chief, was held to have been rightly debarred from introducing other evidence upon the same point in rebuttal. In that case, Mr. Justice Bigelow said: "The plaintiff, in proving his *prima facie* case, offered evidence to show that the words alleged to be slanderous were not spoken under circumstances which would bring them within the rule touching privileged communications. He was not bound to do this; but, in the exercise of his own discretion, he saw fit thus far to anticipate the defense. Having thus opened this part of the case, and introduced as much evidence respecting it as he deemed expedient, he could not afterwards claim, as a matter of right, to accumulate testimony upon the same point. It was then a mere matter of discretion with the Judge who presided at the trial, to admit or reject the evidence, to the exercise of which no exception can be taken. 1 Greenl. Ev., Secs. 74, 431; *Browne vs. Murray*, Ry. & Mood. 254. *As a general rule in the conduct of trials, if a party elects to proceed in the first instance with proof to anticipate the defense, he should not afterwards be allowed to offer evidence on the same point, in reply to the case made by the testimony of the defendant. To permit a party thus to divide his case leads to confusion, and gives him an unfair advantage over his adversary.*"

The same rule was again enforced in *Holbrook v. McBride*, 4 Gray, 218, 219. The action was brought for the unlawful removal of a fence. The defendant justified on the ground that the act was done in the discharge of his duty as a surveyor. The plaintiff introduced evidence in chief, to show that the defendant acted maliciously, and not in the discharge of duty; and in rebuttal, after the defendant had rested, offered further evidence of malice, which was rejected; and the Court held this ruling to be correct. Merrick J., said: "We see no just cause of exception to the rejection of the evidence offered by the plaintiff in reply, to show that the defendant did not remove the fence in the discharge of his duty as surveyor, but from malice and hostility to the plaintiff. The plaintiff knew from the answer what was to be the

nature of the defense. He chose to attack, and if he could to disprove it, in advance of any evidence offered in relation to it by the defendants; and he was permitted to do so by the Court. No restraint whatever appears to have been put upon him in this course of proceeding. This justly precluded him from the right, without the permission of the Court, of introducing in reply, and at the close of the trial, merely cumulative evidence to the same point. *York vs. Pease*, 2 Gray, 232. The order in which witnesses shall be called and evidence given is often within the discretion of the Court. *Cushing vs. Billings*, 2 Cush. 158. When it is so, the ruling is not open to revision."

The same doctrine was applied in the same Court in *Macullar vs. Wall*, 6 Gray, 507, 508. It was also adopted and enforced in *Williams vs. Dewitt*, 12 Ind., 309. See also other cases collected in the respondent's brief on the original hearing in this Court, Part II, p. 5, *et seq.* and in the former petition for rehearing, p. 5, *et seq.* The cases here cited, however, are sufficient, we think, to satisfy the Court that the rule referred to prevails in this country, and in this State. That it is the rule in equity as well as at law, we respectfully submit, cannot be doubted, at least in this State. We have under the Code but one form of action, but one system of procedure, and but one rule of evidence. Consequently the competency of evidence must be determined by the same tests in a suit in equity as in an action at law. We know of no authority, and there is, we submit, no reason for holding, that a different rule prevails in equity from that which attains at law upon the subject of rebuttal. The rule laid down by the cases to which we have referred is as necessary and wholesome in a suit in equity as in an action at law. No more in the one forum than in the other ought a party to be permitted to prove his case upon any particular point piecemeal. Where there is an affirmative defense, the plaintiff may anticipate it, and introduce evidence to meet it in chief, or he may hold back his evidence on that point for rebuttal; but he cannot be allowed to do both, either at law

or in equity. It makes no difference, therefore, in the present case, whether the assumed defense of the disappearance of the channel after suit brought was an affirmative defense or not. The plaintiffs having elected to anticipate it, and to introduce evidence upon that point in advance, were bound to go through with it, and could not save any part of the testimony for rebuttal.

The circumstance that one of the witnesses offered in rebuttal by the plaintiffs on this subject of the existence of a channel after suit brought, was in company with certain witnesses for the defendants at the points where they testified that there was no channel, and was offered to contradict those witnesses, does not alter the case in the least. The fact to be proved was the existence of the channel, and that fact the plaintiffs had already undertaken to prove in chief, as to the entire length of the slough. The fact that several witnesses were together on a certain occasion at a certain place, where there is said to have been no channel, was an immaterial collateral fact, and did not authorize the admission of one of those witnesses in rebuttal for the plaintiffs, to contradict the testimony of the others as to the existence of the channel at that place. Estee, who was introduced as a witness in rebuttal of certain of the defendants' witnesses, whom he accompanied to the slough at a certain point, was a resident in that vicinity, and was familiar with the slough and its channel, if it had any. If examined in chief he could have testified respecting the existence of the channel throughout the region with which he was acquainted, not only at the point visited on that occasion, but at all points, and if the plaintiffs desired his testimony they should have introduced it in the beginning. They should have had him follow the channel through at the point where he was familiar with it, just as they did in the case of Wible and other witnesses. His knowledge of the existence of a channel at a particular point on a particular day, when the defendants' witnesses were present, could not possibly come in as rebuttal, because the existence of a channel, at that

point and at all points, at the commencement of the action and afterwards, was part of the plaintiffs' case in chief, as they had undertaken to make it.

The truth is, that this alleged rebuttal was, as the Court below regarded it, merely an attempt to build up the plaintiffs' case in chief after it had broken down. Their most trusted and confidential witnesses had been engaged during the trial, and while they were putting in their case, in an anxious search through their swamp for the channel of this mythical river. Like a veritable "will 'o the wisp," it danced over the swamp, now here, now there, now appearing, now vanishing, but ever luring them on. Mr. Wible set out on a hurried channel hunt through the swamp a few days before giving his testimony, and by the aid of a fervid imagination convinced himself that he had succeeded. His testimony, with that of other imaginative persons who had engaged in similar searches, was put in to prove a channel through the swamp down to and during the time of the trial. But in the face of the searching scrutiny and careful measurements of the defendants' witnesses, the pretended channel vanished. The plaintiffs then reorganized their corps of channel hunters, and set out on a fresh search over the same ground under the pretense of rebutting the defendants' evidence in answer to their own case in chief. The fact that the evidence offered in rebuttal, so far as it related to the status after suit, was merely cumulative and corroborative of the case in chief was not, we feel assured, sufficiently brought to the notice of the Court, because the question was not raised. If it had been, upon the principles laid down in the prevailing opinion, the whole of the alleged rebuttal must have been held properly excluded. That the Court will, under the circumstances, afford us an opportunity of correcting the misconception of the facts upon which the opinion was based upon this point, we do not permit ourselves to doubt.

3. *No such defense as that the channel had at any point ceased to exist after action brought was alleged, claimed, attempted to be proved, or found by the Court below, and this Court is not warranted in assuming, contrary to the fact, that there was such a defense, for the purpose of establishing error in the judgment.*

There is no allegation or suggestion in the pleadings of any such defense as that a channel having once existed in any part of this swamp, had ceased to exist since the suit was commenced. The defendants have never made, or even hinted at, any such claim. They never offered a syllable of evidence with a view to the support of any such theory. Their contention was, and is, that there never was any watercourse with a defined channel through that swamp, so as to constitute the owners of land there riparian proprietors within the meaning of the law. The evidence which they introduced on that point was merely intended to negative the case attempted to be made by the plaintiffs, that there was and is such a watercourse, with such a channel, down that slough. The plaintiffs, in offering their attempted rebuttal, made no pretense of doing so in reply to any supposed defense that the channel had ceased to exist, or undergone any material change after the commencement of the suit. Such a defense, depending on facts arising after action brought, could not have been made, we submit, under the pleadings as they stood. A supplemental answer would have been necessary. (Code of Civ. Proc., Sec. 464.) And even if the defendants' evidence respecting the existence of a channel at the time of the trial had been offered upon any theory of a change in the channel, the Court clearly did not consider it, or give it any effect for any such purpose. It was considered solely with a view to the rebuttal of the plaintiffs' claim, that there had ever been a sufficient channel and watercourse there. There was no finding that there had been any change, such as that supposed. The plaintiffs' rebuttal, therefore, if admitted, could not have changed

the result as to the point which is assumed to render it competent as rebuttal. The rebuttal is said to have been admissible to negative a conjectural defense of a change in the channel after action brought; but as the Court found no such change upon the defendants' evidence as it stood unrebutted, the rebuttal was unnecessary. The plaintiffs obtained without it all that they could rightfully have obtained with it.

Whatever may be the opinion of the Court, upon further reflection, as to that supposed defense being really and legally presented upon this record, so as to give it a controlling effect in determining the admissibility of their alleged rebuttal, we suggest with all possible deference that the case ought not to be ruled upon a point now for the first time raised by the Court itself, and never argued by either party, without giving the respondents at least an opportunity to discuss it. The point is novel, and it certainly ought not to be held decisive of a case of such magnitude and importance without ample examination. We go further. We venture to suggest that it is contrary to fundamental general rules of procedure in all appellate tribunals, to reverse a judgment upon a point never presented in the Court below. If the evidence for the plaintiffs in rebuttal upon this question of the existence of a channel was competent in the view and for the purpose suggested by the Court, both the Judge who tried the cause below and the counsel for the respondents should have been advised of the view and purpose by the offer of the testimony. It is elementary, that an offer of evidence should specify the purpose for which it is offered. *Carskadden vs. Poorman*, 36 Am. Dec. 145. There certainly was no intimation in any of these offers that there was any purpose of rebutting a supposed affirmative defense that a channel once existing had ceased to exist after the suit was brought. If any such suggestion had been made, the defendants would certainly have consented to an entry upon the record, to the effect that they did not and would not claim any such thing. Even if the evidence was admis-

sible for the purpose suggested, if it was not offered for that purpose, the ruling rejecting it was not error, unless it was admissible generally to confirm the plaintiffs' principal case, and to rebut the defendants' rebuttal of it. This Court has no right to assume that the offer was made for a purpose which was not stated, so as to reverse this judgment.

Before the cause was last argued, the Court made the following order:

"On the re-argument of this case, the Court is particularly desirous of hearing counsel on the following questions:

"1. Did the Court err in sustaining defendants' objections to the introduction of evidence by the plaintiffs after both parties had once rested, to prove what was the condition of Buena Vista Slough where the 'De Weber Road' crossed it?

"2. Did the Court err in sustaining defendants' objections to the introduction by the plaintiffs of the certificates of sale by the State of the lands claimed by plaintiffs?

"3. Are all the facts found in Findings 63, 64, 67, 68 and 69, or in any of them, sufficient to justify the denial of the equitable relief prayed by plaintiffs?"

In its decision, the Court resolved the first question in our favor, and that necessarily made the other two immaterial; for if the finding as to the watercourse was unimpeachable, neither the date of the plaintiffs' title, or their laches, could make any difference as to the result. But the Court, after the submission of the cause, raised another question never before suggested in the case, and upon which it had never requested or heard argument—a question based upon a supposed condition of the record which did not really exist—and has made the whole case turn upon that question, so based upon a misconception of the true state of the record. This, we think, ought not to stand.

4. *If the alleged rebuttal as to the channel were admitted, it could not change the result, because even if there is a watercourse through the swamp, it is no part of Kern River.*

If the evidence offered in rebuttal as to the existence of a channel at particular points in Buena Vista Swamp had been admitted, we insist that it would have been wholly insufficient to make out a watercourse. When one considers the ludicrous spectacle of Wible and other witnesses for the plaintiffs hurrying to and fro in this swamp anxiously searching for a watercourse, pouncing upon every sag and depression in the land as a channel, and every little damp spot as a stream, it is difficult to treat seriously the claim that bog is, after all, a river. If all the evidence as to the alleged channels had been admitted, it would simply have added a few more to the catalogue of bog-holes, wet and dry, out of which the plaintiffs have endeavored so strenuously to construct a watercourse. It would still have been far from the remotest semblance of a real watercourse, even under the loosest possible definition of that term. It seems to us that it must strike every unprejudiced mind, that a stream patched up out of such materials, which it requires "the patient search and vigils long" of a Wible to discover, cannot be considered a genuine stream. It is no figure of speech to say that a river thus manufactured "will not hold water."

But conceding that the evidence, if admitted, would tend to show that there is an actual river rolling its impetuous torrent somewhere through the mysterious solitudes of Buena Vista Swamp, "hearing no sound save its own dashings," it does not affect the further fact found by the Court, that this slough is no part of Kern river. It is just as essential to the plaintiffs' case that this alleged stream should form a part of Kern river, as that it should be a stream at all. The defendants are found to have diverted the waters of Kern river before it flows into Buena Vista and Kern lakes. It is found also that the river flows into Buena Vista slough,

a little north of Buena Vista lake, and thence south into that lake and Kern lake, and that when those lakes overflow, during periods of high water, the surplus water runs back north, in a contrary direction to the current of the river and makes its way down Buena Vista slough and swamp. Even conceding, then, that the excluded evidence would show that there is a well-defined and continuous channel through the swamp to Tulare lake, through which this overflow runs in a steady current, when it runs at all, and yet there is nothing to overcome the finding that this is not Kern river. Indeed, it cannot be Kern river. It is a physical impossibility for the same river to flow in two opposite directions, at the same place, at the same time. And yet this is what happens, if this alleged stream is a continuation of Kern river. The surplus water escapes at the point of entrance of New river and flows back, with a current of its own, into Buena Vista slough. That new stream, thus originating in Buena Vista lake, if it is a stream, is and can be no more a continuation of Kern river than the overflow of a cistern is a continuation of the current which feeds the cistern. The diversion of part of Kern river, therefore, before it flows into Buena Vista lake, cannot be a diversion of the new stream, if there is any flowing out of that lake over the plaintiffs' lands; and the plaintiffs have no right of action for such diversion, although it may result in a consequential injury to them, because the consequence is too remote from the cause. *Cummings vs. Barrett*, 10 Cush., 187; *Rroadrent vs. Ramsbotham*, 11 Ex. 615; *Rawstrom vs. Taylor*, Id. 602.

This point was urged in our former petition for a rehearing, and we respectfully insist that it is worthy of the serious consideration of the Court. If it is sound, and we earnestly maintain that it is, even if there was error in rejecting any or all of the plaintiffs' attempted rebuttal, the findings of fact which will yet remain wholly unaffected by those errors, showing the alleged stream in the swamp not to be any part of Kern river, will support the judgment, and it must be affirmed. We see no escape from this position.

III.

REBUTTAL AS TO THE CERTIFICATES OF PURCHASE.

Granting, for the sake of argument, that the alleged rebuttal as to the channel was improperly rejected, and that, if admitted, it would tend to show that there was and is a watercourse, within the meaning of the law, through Buena Vista Swamp, and that it was and is a part of Kern River, the defendants must still prevail, and the judgment must be affirmed, unless there was error in rejecting the certificates offered in rebuttal; because, without those certificates there is no evidence of any right or title in the plaintiffs, as riparian owners, anterior to the defendants' appropriation. This we take to be conceded in the opinion of Mr. Justice McKinstry. Were those certificates, then, improperly rejected, as laid down in that opinion? We respectfully, but most earnestly, insist that they were not.

1. *Certificates not competent, either in rebuttal or in chief, because the evidence was repugnant to the pleadings.*

It is alleged in the complaint that the lands claimed by the plaintiffs as riparian owners "are swamp and overflowed lands, and as such belonged to the State of California until the year 1876, and later; in which year and at various times afterwards, and before the commencement of this action, they were granted by the State to plaintiffs or their grantors." The answer admits and alleges, "on the defendants' information and belief," that "the lands in said complaint described are swamp and overflowed lands, and as such belonged to the State of California until the year 1875, and later." The findings, as to the plaintiff's title, are in exact accord with their own sworn complaint. And yet, they now insist that that finding is erroneous, and that the Court

ought to have permitted them, not in the first instance, but in rebuttal, to prove a title contrary to their allegations! The learned Justice who delivered the opinion of the majority of this Court, holds that the plaintiffs were not precluded by the allegations of their complaint from proving that the State did not own the lands at the date alleged, but that they themselves owned it. The reasoning upon which this proposition is put, we respectfully submit, is not a satisfactory answer to the objection urged by the respondents. It is said that the allegation of the complaint on this point, amounted simply to an averment that the State owned the lands down to the date of the grant to the plaintiffs or their grantors, or at least to the date of the initiation of the proceedings under which the plaintiffs' patents were issued; that this fact would be presumed, and the Court would take judicial notice of it, without any such averment; and that the allegation might be disregarded, and did not preclude proof by the plaintiffs to the contrary. Now, we submit that, as a general proposition, the Court will not and cannot take judicial notice that the State ever owned any particular tract of swamp land in California. There are large tracts of land of that character in the State, which are located on Mexican grants, and which the State never did own. And even as to lands of that character which it has confessedly once owned, there is no necessary uncontrollable presumption, and there can be no judicial knowledge, in the absence of averment and proof, that it continued to own any particular tract thereof, until it was granted to some particular grantee. *Non constat*, that there may not have been intermediate grants to other persons. It is not legally impossible for the State or any other land-owner to make two perfectly valid conveyances of the same land, by re-acquiring the title after the first conveyance. The object of the pleader in alleging the State's continued ownership of the land

here in question, down to 1876, and later, and until the alleged grants to the plaintiffs or their grantors, was no doubt, in part at least, to negative the idea of an intermediate conveyance to somebody else, under whom the defendants might have acquired a right to divert the water alleged to have been diverted.

It is no doubt true, as a general rule, that in a case like this, a party is not required to allege the date when his own title accrued. Ordinarily, indeed, it makes no difference, with respect to the right to enjoin a continued diversion of a watercourse, whether the plaintiff or his grantor owned the land at the time of the original diversion, if it was unauthorized, or has been enjoyed for a period sufficient to give title under the Statute of Limitations. In this case the plaintiffs might have contented themselves with a general averment of their ownership of the land in question, and of the diversion. But under the peculiar circumstances of the case, having undertaken to aver that their title did not accrue until after a specified date, and that until then the State owned the lands, and that allegation having been admitted in the answer and acted upon by the defendants, the plaintiffs, it seems to us, were not at liberty to contradict it in their proofs. A party may make an unnecessary fact material by alleging it, and bind himself to prove it as laid, and not otherwise. Here the date of the termination of the State's title was material in itself, as soon as the fact that the State ever owned the lands was disclosed. As soon as that fact was alleged, the complaint showed on its face that there was a time beyond which, without any other grant or license than a public and known statute, the defendants might lawfully divert this water, and thereby acquire a right to do so permanently. The plaintiffs having averred that the State owned the lands up to a certain time, and therefore, by necessary inference, that until then the water was a subject of appropriation, and the de-

fendants having admitted the averment, and alleged an appropriation prior to that time, that fact stands like any other material fact, admitted on the face of the pleadings, and cannot be controverted. Certainly the defendants having admitted it could not afterwards dispute it, then why should the plaintiffs be permitted to do so? The plaintiffs have alleged a state of facts which renders the defendants' appropriation lawful; upon what principle, then, can they be allowed to prove a different state of facts? A plaintiff has no right to mislead his adversary by averments which disclose to him a perfectly valid defense, and after those averments have been admitted and made a basis for the defense, come in and disprove them.

2. *Certificates not competent in rebuttal, because, if admissible at all, they were part of the plaintiffs' original case.*

The plaintiffs alleged title to these lands and the allegation was denied. And furthermore they alleged, as we have seen, that prior to 1876, and later, down to the date of the grants to them, or those through whom they claimed, the State owned the lands, and therefore, by inference, that until then the waters thereon were the subject of lawful appropriation and diversion; and they were notified by the answer that an appropriation was claimed to have been made during that period. Now if, in an ordinary case of diversion, the burden of proof of the plaintiffs' title, and of the whole of it, is upon him in the first instance, how much more so was it upon the plaintiffs in this cause. Whatever evidence they proposed to introduce on this point, they were bound to introduce as part of their case in chief. There is no ground, as it seems to us, upon which they could withhold part of their evidence of title and claim the right to introduce it by way of rebuttal. To say that they could first prove their patents, and then, on proof

by the defendants of an appropriation prior thereto, go back and prove an earlier title, amounts to a practical abolition of the distinction between original and rebutting evidence. Much more, where as here the alleged rebutting evidence does not relate to a distinct title, but is merely supplemental proof of the very same title first proved. The only view in which the certificates could be competent would be, to aid the patents by showing that they took effect by relation thereto. They were clearly merely part of the proof of the patents themselves.

If we rightly understand the opinion of the majority of the Court, it is conceded that the certificates were not competent in rebuttal as proof of title, but only to show that the defendants, appropriation was not lawful, because the lands had, at the date thereof, ceased to be State lands. Mr. Justice McKinstry says: "So far as the certificates merely tended to prove title in the lands at and prior to a wrongful diversion of water by defendants, they were not admissible *in reply*. Proof that they were owners at the time of the diversion complained of, that is the diversion which occurred after they became owners as alleged, was part of their original case. The plaintiffs were fully informed by the answer that defendants relied upon a right to appropriate water acquired from the State prior to the date of the patents. But that was an affirmative plea, the averments of which it was for the defendant to establish. If when the plaintiffs rested they had proved title by patent, the existence of a watercourse running through the lands, and diversion by the defendants subsequent to the patents, they had proved their case, not merely *prima facie* but conclusively, in the absence of proof of the affirmative matter set forth in the answer. They were not bound to disprove in advance the appropriation pleaded. Having made out, or attempted to make out, their case in the first instance, the plaintiffs would not have been

entitled, in contradiction of evidence given on the part of the defendants, under the denials of the answer, that the plaintiffs were not the owners at the time of the alleged diversion, to produce further evidence in support of their title. But after the defendants rested, the plaintiffs were authorized to meet the evidence in support of the plea, that the water was appropriated, by evidence that the waters were never legally appropriated by the defendants. If the waters could be appropriated, as against the lands described in the complaint, only while they remained the lands of the State, then evidence that, when the appropriation was made, the lands were *not* the lands of the State, was admissible ; and none the less admissible, because it also proved that the plaintiffs or their assignors were then the owners."

But we submit, that if the certificates were not competent, when offered, to show title in the plaintiffs at the date of the appropriation by the defendants, they were wholly immaterial and inadmissible for any purpose. The plaintiffs were bound to stand upon the strength of their own title at the time of the appropriation ; and failing to show such title, they had no *locum standi* to object to the appropriation, or to impute any illegality therein. They could not prove title out of the State at that date to defeat the appropriation, unless they connected themselves with that title. They could impeach or defeat the appropriation, if at all, only because they or their grantors then owned the lands. And any evidence offered by them for the purpose of showing the appropriation unlawful from want of title in the State, must have been admissible, if admissible at all, solely because it proved title in themselves or those under whom they claimed. And furthermore, as the Court will see on examining the plaintiffs' offers in this behalf, (Transcript vol. 5, p. 65), the distinct ground, and the only ground, upon which the certificates were sought to be introduced was, that they tended to show title in the plaintiffs prior to the appropriation. It is clear, then, that upon the very principles laid down by Mr.

Justice McKinstry, they were not competent in reply, except in the discretion of the Court. And no abuse of that discretion is or can be successfully claimed.

3. *Certificates were not proper rebuttal, because the plaintiffs assumed the burden in their case in chief of showing title antedating their patents, and also because they, themselves, proved that the water was diverted and appropriated before the issuance of their patents.*

It is said, in the opinion delivered for the majority by Mr. Justice McKinstry, as has been heretofore stated, that the Court is "not aware that the English rule, which at one time prohibited a plaintiff, in case he gave any evidence tending to negative an affirmative defense in the first instance, from giving further like evidence in reply, was ever enforced in this country or in equity." We have, however, already called the attention of the Court to a number of authorities showing, beyond doubt, that this is the rule now, not only in this country, but in this State. In this place we need only mention the names of these cases here, referring your Honors to the more extended examination of them given in the former part of this petition. *Casey vs. Leroy*, 38 Cal. 699; *York vs. Pease*, 2 Gray, 282; *Holbrook vs. McBride*, 4 Id. 218; *Macullar vs. Wall*, 6 Id. 507; *Williams vs. Jewett*, 12 Ind. 311. See also the respondents' brief on the first hearing in this Court, Part II, pp. 6, *et seq.* We have, we think, also shown that there is no ground for holding that the rule in equity on this point is in any way different from that which prevails at law, at least in this State.

Assuming, therefore, that the plaintiffs were not, at the outset, bound to anticipate the defense of an appropriation anterior to their patents, or to show any prior title in themselves, if, nevertheless, they did go into that subject in chief, they were bound to exhaust their evidence upon that point then; and failing to do so, they could not, under the rule of the above cases, claim as a matter of right to go into the

matter again in rebuttal. As a matter of fact, they did undertake, in their original case, to anticipate the defendants' case, and to show title in themselves anterior to their patents. The very first piece of evidence which they introduced on opening their case, was directed to this end. The power of attorney from Baker to Livermore of Dec. 29, 1868, and Livermore's deed of May 28, 1870, to Miller and Lux, in pursuance thereof, and of other powers of attorney, could not have been introduced for any other purpose. So, too, the plaintiffs' evidences of their possession anterior to patent were put in with the same view. It is suggested, in answer to this point, in the opinion of the majority of the Court, that "mere prior occupation of lands of the State can constitute no reason for preventing the diversion of water flowing through them by one expressly authorized by the State to divert the water from the occupant." True enough. But this does not militate against our position as to the effect of the introduction of this evidence. We are not concerned with the sufficiency of the evidence to show a title anterior to patent which would prevent an appropriation of the water. We admit, and indeed insist, that it *was* insufficient. If it had not been, the plaintiffs would not have tried to supplement it, or to supply its place by these certificates in rebuttal. Our contention is that, having introduced this evidence to prove some sort of title anterior to their patents and to our appropriation, however insufficient it was for that purpose, they were bound then to introduce all their evidence on that subject, and could not go into it again in rebuttal.

It is conceded in several places in the opinion of the majority of the Court, that the plaintiffs were bound to prove title in chief anterior to the diversion of the water. And we contend that if they, in their opening, gave evidence tending to show that any of the water was actually diverted, or that steps were being actively taken therefor, prior to their patents, and when, upon their own allegations and proofs at that stage of the cause, the State owned these lands, they were

certainly bound then, if not otherwise, to trace their title back beyond their patents. Now the plaintiffs' earliest patent was dated January 18, and recorded January 25, 1876, and that was for land in Townships 25 and 26, in the vicinity of Tulare Lake, through or along which there can not possibly be found to have been any channel, admitting all the plaintiffs' alleged rebuttal respecting the existence of a channel. But the plaintiffs' evidence shows that long before that patent issued, the defendant corporation had been incorporated, and its ditch had been actually constructed for the appropriation and diversion of this water for a distance of eight or nine miles (Transcript, vol. 2, pp. 539, 540); and their evidence tends to show that the water was running in the ditch at or about that time. (Id. 69, 539, 540.) Proof of these facts certainly put them upon proof of some title anterior to that patent, and of course anterior to the subsequent patents. They had no right to assume that a ditch constructed on government land to divert water upon what, as the case then stood, was State land, was constructed without authority, and that the proposed appropriation was unlawful.

4. *Certificates not competent or available in rebuttal, without offer of proof of payment.*

We insist that, in any view of the case, these certificates of purchase were not competent in rebuttal, and could not confer riparian rights, without proof, or offer of proof, of payment of the purchase money. At the close of the defendants' evidence, the position of the parties was this: The plaintiffs had produced patents from the State for their lands, all dated in 1876. The defendants had proved a prior right under a legislative grant from the State, to divert water upon those lands, (supposing them to be riparian lands, and to be upon the stream diverted). The defendants therefore had the better right, unless the plaintiffs could overreach that

right by some superior equity. The case was precisely that of two conflicting patents for the same land. A legislative grant of this nature is equivalent to a patent, the title under it attaching as soon as the grantee has taken the statutory steps to appropriate the water so as to give him priority. The same rule applies as is applied to the 500,000 acre grant to the State. The title attaches when the land is selected. *Megerle vs. Ashe*, 27 Cal. 328. Of course, there is no grant here of any specific water to any specific grantee. But the statute provides a mode for the identification of the property granted; and whoever chooses to avail himself of the benefits of the statute, becomes thereby identified as the grantee. Now in a case of conflicting patents, the rule is that the junior patentee can prevail only by showing a prior and better equity. He must show full performance of all the requirements of the statute under which his patent issued, anterior to the older patent, so as to give him an equitable title as against the latter. (*Megerle vs. Ashe*, 27 Cal. 328; S. C. 33; Id. 85; *Smith vs. Acthern*, 34 Id. 514.) In both the cases just referred to, the contest was between a patentee of the State under the 500,000 acre grant, and a junior patentee of the United States under the pre-emption law; and it was ruled that the latter could prevail only by showing "a better equity arising from his prior occupation and settlement, followed up by proper proceedings to protect his pre-emption, and these proceedings have resulted in a patent;" *Smith vs. Acthern*, *supra*, and that the conditions precedent, as to his status entitling him to exercise a pre-emption right, must also be shown affirmatively. (*Megerle vs. Ashe*, 33 Cal. 85.) And it was furthermore held, in that case, that the facts upon which the pre-emptor's claim rested could not be shown by recitals in official documents, to which the older patentee was not a patentee; and Rhodes, J., said: "The fact that the claim was made or approved may

and should be proved by official certificates, record entries, or other appropriate documentary evidence ; but the facts upon which the claim rests cannot be shown, as against a person claiming title through another and a different course of procedure, by the recitals in official documents to which he bears no relation."

Now, in the present case, the plaintiffs could not show a superior equity in rebuttal, if they could rebut at all, without proof of payment, or at least of the first twenty per cent. of the purchase money before the defendants' rights accrued. And they could not show payment by the recitals in the certificates as against the defendants—even if there were positive recitals of such payment. But there are no such recitals in these certificates. They recite merely that it appears from the report or certificate of another officer, the county treasurer, that payment has been made. This, we submit, would not be evidence of payment against anybody, and certainly not against the defendants, who, at that stage of the case, it must be admitted, had established a prior legal right. (*Osgood vs. Water Co.*, 56 Cal. 518 ; *Daniels vs. Lansdale*, 43 Id. 41 ; *Lansdale vs. Daniels*, 11 Otto, 178.) There was no offer of any other proof of payment, either in connection with the certificates or at any other time.

IV.

DOES THE MODERN ENGLISH COMMON LAW OF RIPARIAN RIGHTS PREVAIL IN CALIFORNIA ?

We approach this question with an abiding conviction of its importance, not merely as a question of law, but as a question of social and municipal economy. We are confident that it is not necessarily involved in this case, and we hope

and believe that the Court, upon further reflection, will be constrained so to hold, and in the exercise of a wise conservatism, will decline to rule upon the question until it is fairly and distinctly presented between a real riparian proprietor upon a real stream, and an appropriator of the waters of that stream ; and until by more extended research and discussion, the members of this Court may be able to attain something like unanimity, and the bar of the State, as well as its people, may be brought into general accord respecting it. But if the Court shall, after the most anxious deliberation, reach the ultimate conclusion that notwithstanding the grave differences of opinion existing among its members, it must decide the point here and now, in a case in which even upon a retrial under the most favorable auspices for the plaintiffs, we believe that it will be made to appear that they are not riparian owners, and that there is no watercourse, then we feel that the case is big with the destiny of California. It is, therefore, with a solemn sense of our responsibility, not only as counsel in this cause, but as patriotic citizens of this great commonwealth, that we venture again earnestly to urge upon the Court our views upon this question.

1. *Right to water in innavigable streams in California under the Mexican Government.*

Mr. Justice McKinstry, after an exhaustive examination of the Spanish and Mexican authorities, declares that at the date of the cession of California by Mexico to the United States, the law upon this subject was as follows :

“The waters of innavigable rivers, while they continued such, were subject to the common use of all who could legally gain access to them for purposes necessary to the support of life ; but the Mexican Government possessed the power of retaining the waters in their natural channel, or of conceding the exclusive use of portions of them to individuals or corporations, upon such terms and conditions, and with such limitations, as it saw fit to establish by law.”

The effect of this doctrine was to make the waters of such streams property, not only distinct from the land, but acquired, held and transferred by a different tenure. This was the condition of things at the cession. What then was the effect of the cession?

2. *Property in innavigable streams, in whom vested after the cession.*

This property of the Mexican government in the waters of such streams existed in it in virtue of its sovereign power, and was a property of much the same nature as that which all the States of the Union have in the beds of navigable rivers within their limits. In that part of the public domain not within the jurisdiction of any organized State, it is a well understood principle, that this property in the beds of navigable waters is vested in the United States in trust for the future States to be there organized. And so in territory newly ceded to the United States, the same principle is applied. Now this property of the Mexican Government in innavigable streams in California being of the same nature; upon the cession it also passed to the United States, to be held in trust for the future State. When the State was organized, this property became immediately vested in it, in virtue of its sovereignty, to be held, used, disposed of, and regulated for the public good. Thus far all is clear, and this, we understand, is the position taken by the majority of the Court, as announced by Mr. Justice McKinstry. The learned Justice suggests it as a plausible theory, that the property of the State was only momentary, and was immediately transferred to the United States as a result of the admission of California "on an equal footing with the original States." It seems to us clear, however, that the State could not thus be stripped of an incident of its sover-

eignty, adapted to the wants of its people and to the exercise of which they were accustomed. The "original States" had no such property, because a different system had always prevailed there. Their people brought with them from England a rule of property which annexed innavigable streams to the soil as parcel thereof. Such a stream was there wedded to the land, and the bed of the stream was a marriage bed. But the people of California had brought with them from Mexico, under what may be termed the Mexican common law, a different rule of property, whereby the land and water in such streams were twain and had never been joined. The water, except so far as irrevocable concessions had been made, was a species of public property, to be controlled for the good of all by that government which should succeed the Mexican Government in its sovereign powers as to matters of domestic and local concern. The people had a right to demand, when they became subjects of the United States, that this rule should not be changed, except by some local government, lawfully organized over them. The admission of the State could no more operate the abolition of the rule and the transfer of this public property in the streams to the general government, than it could effect a similar transfer of the public right in the highways of the State, or of the private property of any citizen.

3. *Did the Act of April 13, 1850, grant away the property of the waters of innavigable streams, and constitute them thereafter part of the land.*

Mr. Justice McKinstry says, however, that, at all events, the act of the California Legislature of April 13, 1850, adopting "the common law of England * * * as the rule of decision in all the Courts of this State" operated as a grant of the State's property in these innavigable streams to the riparian owners thereon, and annexed them permanently to the land; and that the United States, as the then owner of the swamp lands subsequently granted to the State

became thereby the owner also of all innavigable streams on said lands as parcel thereof.

We respectfully insist that that act did not and could not have any such effect, and that it cannot be presumed to have been intended so to operate. The State of California had no legal or constitutional existence at the date of the act referred to, because it had not then been admitted into the Union, and was not admitted until nearly five months afterwards. The property which the act is supposed to have granted was not then, of course, vested in the State. The Legislature, which is supposed to have made the grant, had no power to grant anything, because the constitution, under and by authority of which it purported to exist, had not yet received the *fiat* of the only power which could make it law. And we respectfully submit that where there is no grantor, no power to convey, and nothing to be conveyed, it is exceedingly difficult to imagine how any conveyance can be made. As a conveyance, that act was, as we conceive, so utterly and irredeemably void, that no subsequent act could give it any semblance of validity. The so-called Legislature could, we respectfully submit, no more convey away the property of the future State of California, than the "three tailors of Tooley Street" could convey away the crown-lands of England. Before its admission, the embryo State of California was a mere voluntary organization, with no more legal power than a vigilance committee. It requires the concurrent action of the people of the particular locality to be governed, and of the proper federal authority, to create a State of our Union. A prospective State cannot, by its own volition, anticipate the hour of its birth, and thrust itself untimely into the world, so as to have any legal existence or authority.

The State of California, prior to its admission, was at best a mere *de facto* government. As such, its acts of pure legislation, and merely municipal legislation, though not valid in fact, may yet be deemed to have acquired a sort of semblance of validity by the acquiescence of the people, and

of the subsequent *de jure* State, so that proceedings taken and rights acquired thereunder will not be disturbed on grounds of public policy. But any attempt which it might make to convey the future rights, property, and powers of the real State, could not become valid and operative by any mere acquiescence. An absolutely void deed cannot be made valid by acquiescence.

But this act does not purport to be a conveyance of anything. It professes to adopt the common law as a "rule of decision * * * in all the Courts of the State." We confess our entire inability to perceive how such language can be construed into a conveyance. Any such construction can at best be but a mere legal fiction, for the purpose of giving the act such operation as the Court may suppose, for reasons independent of the act, that it ought to have. We submit that it ought, at least, not to be construed as intended to operate upon a future title, which could not vest until the State should become possessed of its full powers and prerogatives by final admission. There is no consideration of public policy or justice, as it seems to us, which requires any such construction.

We admit that the statute in question cannot be construed to have had the effect to annex the water in innavigable streams to the land as parcel thereof, without holding it to operate as a grant. But we respectfully deny that that is any reason for holding it to be a grant, when upon the face of it it is not, and when, as we submit, the pretended Legislature had no power to make the grant supposed, even if they had inserted express granting words in the statute. We consider it, on the contrary, to be a reason for holding that the statute was *not* intended either to annex the water to the land, or to adopt the rigid, unsuitable, and as applied to our conditions, unreasonable, riparian doctrine of the English common law.

4. *Statute in question, if intended to adopt the common law as a rule of property at all, was not intended and cannot be construed to have adopted it, except so far as applicable to the physical and climatic conditions and necessities of the State, the institutions of the country and the wants of the people.*

It is conceded, apparently, in the opinion, that the English common law was imported into this country by the original colonists, only "so far as applicable," but it is said further, that "there is no implied exception" in these words, "which would exclude the common law from the colonial law, except perhaps, when the question was *ab ovo*, and no principle of the common law could have appropriate bearing upon it." With deference to the Court, we submit that this deprives the phrase referred to of all effective meaning. It is equivalent to saying that the common law is applicable so far as it is applicable; which means, we submit, just nothing at all. The principle sustained by the better authority upon this point is, that the common law was generally adopted by the colonists on their settlement here, only so far as conformable to their institutions and laws, and suited to their condition and circumstances. *Cooley Const. Lim.* (5th ed.) 32: *Parker vs. Foote*, 19 Wend. 318; *Seeley vs. Peters*, 10 Ill. 140; *Van Ness vs. Packard*, 2 Pet. 144; *Pennock's Estate* 59, Am. Dec. 718. In *Parker vs. Foote*, 19 Wend. 318, Bronson, J., says: "It cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law." And in 20 Wend. 159, it is said by the same learned Judge delivering the opinion: "I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition, form no part of the law of this State. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as were

framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself, to apply a rule founded on a particular reason to a case where that reason utterly fails. *Cessante ratione legis cessat ipsa lex.*

And in *Pennock's Estate*, 59, Am. Dec. 518, it is held in Pennsylvania, that only so much of the English common law is adopted there, as is suited not only to the circumstances, but to the customs of the country.

So, also, one of the most eminent of American jurists and statesmen, Judge Thurman, of Ohio, lays down the same rule in language too plain to be mistaken. He says: "The English common law, so far as it is reasonable in itself, suitable to the condition and business of our people, and consistent with the letter and spirit of our Federal and State constitutions and statutes, has been and is followed by our Courts, and may be said to constitute part of the common law of Ohio. But whenever it has been found wanting in either of these requisites, our Courts have not hesitated to modify it to suit our circumstances, or, if necessary, to wholly depart from it." 2 Ohio State Rep. 329.

So Chief Justice Wright, of Iowa, in delivering the opinion of the Supreme Court of that State, after declaring the common law to be there in force, says: "To say that every principle of that law, however inapplicable to our wants or institutions, is to continue in force until changed by some legislative rule, we believe has never been claimed; neither, indeed, could it be with any degree of reason." And further, in the same opinion, he says: "When the common law has been repealed or changed by the institution of either the State or National Government, or by their legislative enactments, it is, of course, not binding. So, also, it is safe to say, when it has been varied by custom, not founded in reason, or not consonant to the genius and manner of the people, it ceases to have force." 3 Iowa, 402.

Says Mr. Justice Story: "The common law of England is not to be taken in all respects to be that of America. Our

ancestors brought with them its general principles, and claimed it as their birthright ; but they brought with them and adopted only that portion which was applicable to their situation." 2 Peters, 144.

For other cases going to show how far the adoption of the English common law in the United States is modified and limited by local conditions, see the respondents' brief on the original hearing, Part II, p. 99, *et seq.*

It is said by Mr. Justice McKinstry, speaking for the Court in this case: " We know of no decisions which intimate that a difference in climatic or geographical conditions may operate to transfer a right of property from those in whom a right of property is vested by the common law. To so hold would be an attempt to do that which, as contended by counsel, could not be done with reference to the common use to which (as claimed) property was dedicated by the Mexican law. Such conditions may, perhaps, affect the mode of enjoyment of the common right of all the riparian proprietors on the same stream. Nor do we know of cases where the Courts in the United States have undertaken to change the common law."

We respectfully submit that there is no contention on the part of the respondents here, that any " difference in climatic or geographical conditions," or in any other conditions, can operate to divest rights " vested by the common law," or by any law. Our position is, that, so far as the common law is unsuited to climatic, geographic or other conditions here, it must be assumed never to have been intended to be adopted, and therefore no rights have or can to that extent become vested under it. In the present case, for instance, if the Court should hold, with us, that the English doctrine of riparian rights is inapplicable to a country whose streams are so sparse and scant as those of California, and, therefore, is not now and never has been in force here, as to lands derived from the State or Federal government, then the question of " vested rights "

disappears from the case. We insist, not that the plaintiffs shall be deprived of any "vested rights," but that they never had any in the particular now in question; and that the Court shall not "vest" any in them in violation of the traditions, policy, and customary and statute law of California—both as a State and as a Mexican province, from the earliest times until now, under a strained construction of an ill-conceived and obscurely expressed enactment of a Legislature which had no legal existence or power. There is, we submit, no reason in natural justice or in State policy why the plaintiffs should be deemed to have any vested right in the waters now in controversy, when they have never used them, or expended a dollar to make them useful, and do not claim to have been damaged by their diversion, rather than the defendants, who have been for years applying them to beneficial purposes without molestation, and who have invested in the enterprise large sums of money, which, with the time and labor of all these busy years, must inevitably be lost, if they are now deprived of the use of those waters.

There is an intimation in the extract which we have quoted from the learned opinion, and in other parts of the same opinion, that the common law is a kind of unchangeable, indivisible essence, coming down from a remote past, and "progressively discovered" by the Courts, but subject to no modification except by the rude hand of legislation, "without variableness or shadow of turning." If this be so, how is it that we hear so much of the common law of particular States and of the American common law? Why is it that in this very opinion we find quotations from English Judges referring to the "American" doctrine of irrigation? Why is it that our books are full of instances of opposing lines of decisions on the same branch of the law, supporting respectively the "Massachusetts doctrine," the "New York doctrine," the "Indiana doctrine," and the like? We submit that the whole history of our English and American

case law is replete with proofs that the common law does change and grow; and that it readily yields to modification in different localities, to adapt it to diverse social, economic, political and climatic conditions. If it did not, it would be unworthy of the great and growing race whose proud birth-right it is. A learned English Judge speaks, without hesitation, of "making common law." In speaking of some novel phase of copyright law, Mr. Justice Willes says, in *Millar vs. Taylor*, 4 Burr, 2312: "It could be done only on principles of private justice, moral fitness, and public convenience; which, when applied to a new subject, make common law without a precedent; much more, when received and approved by usage."

And one of the ablest of the later American Judges and text-writers says: "The common law of England consisted of those maxims of freedom, order, enterprise and thrift which had prevailed in the conduct of public affairs, the management of private business, the regulation of the domestic institutions, and the acquisition, control and transfer of property from time immemorial. It was the outgrowth of the habits of thought and action of the people, *and was modified gradually and insensibly from time to time* as those habits became modified, and as civilization advanced and new inventions introduced new wants and conveniences, and new modes of business." Cooley's Const. Lim. (5th ed.) 29, 30.

We submit, therefore, that it is in accord with the genius of the common law itself, that, upon its transplantation to a new country like this, it should speedily adapt itself to its surroundings, laying aside its antiquated, insular notions and cockneyisms and becoming a thorough Californian. The men who adopted it did so with some knowledge, at least, of its adaptableness to circumstances. Many of them had come from States in which they had had experience of its wonderful flexibility and power of self-modification and growth. Legislating as they were for a half Mexican population, and many of their own number being of that race, as Judge McKin-

stry suggests, and all of them acquainted with the peculiar conditions and needs of California, it seems to us unreasonable to suppose that they could have intended to adopt an unmodified English common law system. It would have been, and they must have known that it would have been, as grotesquely out of place as a Westminster Judge's wig and gown on a red-shirted, and redder faced justice of the peace in a California mining town. Of all the States in the Union, or on the way in, on that 13th of April, 1850, there was not one to which a thorough, unmodified English common law system would have been so little suited as to California. It is impossible to believe that it, before all the other States, should have been the one to provide itself with such a misfitting system.

Take this very common law doctrine of riparian rights, and suppose it to have been announced to the people of California on the day that act was passed, that that system was thereafter the law of the State ; that every stream was parcel of the land over which it ran ; that all the owners of land along it were entitled to its customary flow, without sensible deterioration or diminution in its natural channel, whether they made any use of it or not ; that it could not be diverted without the consent of every one of them ; and that even as to a stream in the public lands, a subsequent purchaser of those lands would be entitled to it, even though it had already been appropriated,—for that was the common-law doctrine,—how would such an announcement have been received, and what sort of a reception would those legislators have met with on returning to their constituents ?

It must be remembered that in that very Spring of 1850, when this act was passed, a right of appropriation of water for mining and other purposes was, no doubt, being exercised in various parts of the State, in utter disregard of all riparian rights. And, no doubt also, many of the men who voted for that act, themselves, went home afterwards to engage in similar schemes of appropriation. Can it be conceived, then, that they intended to adopt the English

doctrine on this subject, or that they ever dreamed that they had adopted it?

5. *English common law of riparian rights not adapted to California.*

This is a point which, as it seems to us, it is wholly unnecessary to argue at this stage of the cause, if it was ever necessary to argue it. We do not understand that the point is contested, in the opinion of the Court. The fact that the water-supply of California is wholly inadequate to its needs, without a general and systematic well considered plan of appropriation and diversion of distant streams, is one of which the Court must take judicial notice. The grim and uncontested fact is, that if the rigid English doctrine had been strictly enforced from April 13, 1850, until now, and the running streams of California had been imprisoned in their natural channels, and left to flow there as they were accustomed to flow, it would have been the ruin of the State. The golden treasures of its mountains would never have been poured into the lap of the world. Its vineyards and orange groves would have remained dreary wastes. Where stand its stately palaces and temples of trade, would have been sand hills or marshes, or rugged heaps of stone. And the water would still "come up to Montgomery Street," but for the fact that there would be no Montgomery Street. And even now, notwithstanding the long sway of the doctrine of appropriation, if the English riparian law is henceforth rigidly enforced, even with the "American" modification of riparian irrigation, which seems to be engrafted upon it in the prevailing opinion, it must be productive of incalculable injury to some of the most important industries of the State. The announcement of the Court's opinion in this case sent a thrill of dread pulsing through California. That fact, of course, cannot affect the action of the Court; but it shows that the people of California are keenly alive to the importance of this question, and

think they know where their interests lie. And it demonstrates incontestibly, that the English doctrine is not adapted to what they believe to be the conditions and needs of the State.

6. *Doctrine of appropriation, independent of any statute, the recognized customary or common law of California as to all waters in which prior vested rights not acquired.*

It is a part of the common history of the State ; that from the earliest times continuously before and since the act of 1850, the people of the State have, in practice, regarded the running waters on government lands, and upon the lands of the State, as subject to valid appropriation apart from the lands. The land and water have, in effect, been regarded as distinct species of property, held by different tenures. And the people have uniformly acted upon that theory. Except as to private lands, which, with the water upon them, have been recognized as having become subject to riparian law, no heed whatever has been paid to any supposed riparian rights. This, we contend, demonstrates the fact that, in popular construction, the Act of 1850 was not deemed to have adopted the English riparian doctrine.

The Legislature also, when it has spoken at all upon the subject, has, either expressly or by implication, affirmed its power to regulate and control the acquisition and disposition of water rights, on lands not in private ownership, as a species of property independent of the land. The sections of the Code of 1870 hereafter to be considered, constitute an emphatic assertion of the power of the State in the premises, and negatives every reasonable inference that it acquiesced in any pretended surrender of its authority and property in the premises by the Act of 1850.

The Act of Congress of 1866, and the Amendatory Act of 1870, also recognize and adopt the doctrine of appropriation, as applied to waters on the public lands, as an existing and established rule of property.

And finally, the Supreme Courts, both of the State and the United States, have recognized and affirmed this doctrine as to State lands and Federal lands, independently of any statute, in a long array of decisions, beginning in California soon after the organization of the State, and continuing to the present time. *Irwin vs. Phillips*, 5 Cal., 140; *Tulare vs. Spring Creek etc. Co.*, Id. 397; *Conger vs. Weaver*, 6 Id. 555. *Hill vs. King*, 8 Id. 338; *Butte vs. Vaughn*, 11 Id. 153; *McDonald vs. Bear River Co.*, 13 Id. 232; *Rupley vs. Welch*, 23 Id. 455; *Osgood vs. El Dorado etc. Co.*, 56 Cal. 580; *Atchison vs. Peterson*, 20 Wall. 507; *Basey vs. Gallagher*, Id. 670; *Jennison vs. Kirk*, 98 U. S. 458; *Broder vs. Natoma etc. Co.*, 101 Id. 274. Upon the first appearance of this doctrine in the State Court, its novelty, and the attempts of some of the Judges more deeply impregnated than their fellows with old fashioned common law notions, to reconcile it with the recognized English riparian doctrine, led to some rather queer expressions of opinion from the Court. The expressions, however, are generally mere *dicta*, and the decisions are right and in accord with the law. To one of the early cases, *Crandall vs. Woods*, the opinion of the Court in this case devotes considerable attention. That case is explained in our brief on the former rehearing, at pages 48-49, where it is shown that it simply decides that where a party not only takes possession of the banks of a stream, but also appropriates a portion of the water to actual use, he is entitled to the reasonable use of it against a subsequent appropriator of the water for a purpose not interfered with by such reasonable use; or rather, that the subsequent appropriator cannot have an injunction against the reasonable use of the surplus which must otherwise run to waste. So, as Mr. Chief Justice Murray strove to put the case, upon the broad ground that a mere occupant of public land may assert riparian rights against

the subsequent appropriator of water thereon, his opinion is mere *dictum*, unnecessary to the decision. If it is to be regarded as a decision that a mere squatter can assert riparian rights against an appropriator, it is not law. *Corvington vs. Becker*, 5 Nev., 281; *Lake vs. Tolles*, 8 Id. 285; *Osgood vs. El Dorado Co.*, 56 Cal. 574. The majority of the Court here, it is true, seem to regard the case as a decision to the effect indicated, and as not overruled; but we cannot think that this is meant to be an approval of the doctrine that a mere squatter may go upon a quarter section of public land at the mouth of a stream, and by his simple occupation, without right, tie up the whole stream from future appropriations.

But under the lead of the bold, vigorous, and far-reaching mind of Mr. Justice Field, both the Supreme Court of the State, and that of the United States, finally established the doctrine of prior appropriation, on reasonable, just, and unassailable grounds. It has been determined that by the customary law of California, and other Pacific States, without the aid of any statute, a prior appropriator of the waters of a stream on State or United States lands, to a beneficial use, is entitled to the same, at least as against a subsequent grantee of the same lands, and that the English law of riparian rights does not apply. *Achison vs. Peterson*, 20 Wall. 507; *Jennison vs. Kirk*, 98 U. S. 456; *Broder vs. Natoma Water Co.*, 101 Id. 274; *Osgood vs. El Dorado, etc., Co.*, 56 Cal. 580. This point is expressly decided, we insist, in *Broder vs. Natoma Water Co.*, *supra*. And we respectfully submit that the decision is not limited, as indicated in the opinion of the majority of this Court. The case was, that in 1853 the defendant appropriated certain waters, and constructed a canal across public lands. The plaintiff claimed part of the land, as a purchaser under the grant to the Pacific Railroad of 1864, and also as pre-emptor, his pre-emption claim being subsequent to the Act of Congress of 1836; and he brought suit to abate the canal as

a nuisance. His claim as a pre-emptor was of course held unavailing, against the appropriation under the Act of Congress of 1866. As to the claim under the railroad grant, which antedated the statute of 1866, it appeared that the granting act provided that it should not "defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim." The Court held that the defendant's was a "lawful claim," and not affected by the grant; and Mr. Justice Miller, delivering the opinion, said: "It is the established doctrine of this Court that rights of miners who have taken possession of mines, and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations, and for purposes of agricultural irrigation, in the region where such artificial use of water was an absolute necessity, *are rights which the Government had by its conduct recognized and encouraged, and was bound to protect, before the passage of the Act of 1866. We are of the opinion that the section of the Act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.*" The italics are ours.

We respectfully submit that this case did not, and could not, have been decided as it was, if the defendants' claim had not been in fact recognized as valid and legal without the aid of any statute or reservation whatever. The "claim" had to be "lawful" before the reservation could attach, and if it was shown to be "lawful," it was necessarily good and effectual without the reservation. What is a "lawful claim"? This is not a new term in the law, and its meaning is too well understood, indeed, to require any definition. In this connection it obviously means a claim *valid in law*. Suppose, for instance, the term is found in a covenant of warranty, is it not clear that this would be its meaning? And is not this its meaning here?

The case of *Van Sickie v. Haines*, in Nevada, holding a contrary doctrine to *Broder v. Natoma Water Company*, is

overruled by *Jones v. Adams*, 6 P. C. Rep. 442. And it may be taken to be the established law everywhere in the Pacific States and Territories, as laid down in *Broder v. Natoma Water Company*, that as a matter of customary law, anterior to any statute, a prior appropriator of water on public lands is entitled thereto, as against a subsequent grantee.

But why is this so? Clearly because the land and the water are recognized as distinct kinds of property, acquired and held by distinct titles. The theory of a license from the State or the Government will not do. The license would be revoked by the subsequent grant. No permanent right could be acquired by mere license. If then, as to lands belonging to the State, or the general Government at the organization of the former, the water thereon was a distinct kind of property, and if the Statute of 1850, or some other statute, did not annex the water to the land, it can make no difference whether the land has since been granted or not; the water is still subject to appropriation, unless the owner of the land has appropriated it. The doctrine of the appropriability of water necessarily severs it from the land, and it remains severed until the same owner acquires both and annexes them. This is the doctrine established in a Colorado case, where the question was distinctly presented. In *Coffin vs. Left Hand Ditch Co.*, 11 Pac. L. J. 419, an appropriation of the waters of a stream was made in 1863. Certain lower proprietors had some patents antedating the appropriation (we have seen the actual record and know this is the fact) and yet, although that was anterior to any statute or constitutional provision on the subject, the appropriation and diversion were held valid against the prior patentees. This case is fully stated in the respondents' brief on the first hearing, Part II, 60.

7. *Sec. 1410 of the Civil Code merely declaratory of the existing law; and if not, it operated to disannex the water from the land, as to all lands then owned by the State.*

If we are correct in our theory of the effect of the Statute of 1850, the Code provisions are merely declaratory of the existing law, and the saving of riparian rights applies only to rights vested long anterior to the enactment of the Code, at the organization of the State. But if the Act of 1850 annexed the water to the land, on the lands now in question, then the Code disannexed them and declared in effect, that the right to the water might be, forever thereafter, acquired by appropriation. If the former statute was effectual to annex them permanently, the latter must have been equally effectual to disannex them permanently. By declaring that the right to water might be acquired by appropriation, the Legislature virtually negated any other mode of acquisition. The mere executive officers of the State were clothed with no power to grant the water; and if they had, in their swamp land patents, actually and expressly granted the water with the land, it would have been ineffectual, for the patentees would have taken with notice that water was not acquired in that way, and that the Legislature had not clothed the executive officers of the State with power to convey the water. Nor would it make any difference even if the certificates had been issued before the Code was enacted. The enactment of the statute took away the power to issue patents for water. Nor would the purchasers have been injured, for they could still acquire the water by appropriation without cost. That statute therefore either impressed the permanent quality of appropriability upon all water then subject to the control of the Legislature, or it expressed an existing permanent quality of appropriability; and in either view a subsequent patentee of State lands could not acquire the

water thereon, and prevent its appropriation by another, except by making a prior appropriation himself. This is conclusive against the plaintiffs in any possible view of their case. They simply hold the conveyances of certain ministerial officers of the State, whom the Legislature had deprived of power to grant the water, if they ever possessed it. Unless those officers could by their own act repeal the statute, they could not convey the water.

Suppose, for instance, that the Legislature had said: "The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by application to the County Clerk of the proper county, specifying the location of the water, etc., and by obtaining a conveyance from him"; could the State officers who made these swamp lands patents have, after such statute, by conveying the land conveyed the water also, even if they had professed to do so, so that the proper County Clerk could not afterwards have conveyed it to a different applicant? What is the difference between this case and the case supposed? Does not this statute in effect prescribe an exclusive mode of conveyance of certain property of the State, and can any power short of that of the Legislature dispense in any instance with the prescribed mode, and convey in some other way?

There is little need, however, of argument to show that Sec. 1410 applies to *all* waters which could be legally subject to appropriation at the date of the act, and that it must continue so to apply to all those waters so far as they remain unappropriated, whoever may own the land. The provision authorizing the appropriation is as general and unlimited as words can make it. The only semblance of a reservation is Sec. 1422, providing that "the rights of riparian proprietors are not affected," etc. Now, to whom did and does that saving clause apply? The plaintiffs claim that it must apply to *all* who own land upon any stream without reservation, which is, we submit, unreasonable, for then

the act would be entirely nugatory. There are no streams, and there never were any streams, in California, whose banks are not owned by somebody, either by the general Government, by the State, or by some other proprietor. There are and were no streams, therefore, upon that view, which could ever be the subject of appropriation. The provision for appropriation would then be somewhat akin to the permission given by the careful mother, who told her daughter, as we are credibly informed by a popular poet, that she might "go out to swim" but that she must not "go near the water." It is conceded, therefore, by the majority of the Court, as we understand, that at least the State and the General Government are not "riparian proprietors" within the meaning of the saving clause. To whom then could that clause apply? We answer: To those and those only, who had vested riparian rights at the date of the act. Of course, at that time it could not apply to anybody else. And we maintain that its operation could not be afterwards enlarged. But the plaintiffs say that when the State or General Government subsequently conveyed any lands upon which there were unappropriated waters, not reserved by the conveyance, their grantees became riparian owners, within the intent of the saving clause. But how could the grant of the State or United States confer riparian rights, when they were not riparian owners themselves, and had no riparian rights under the construction given to the act by the Court? Either the water was annexed to the lands as parcel thereof while those lands were owned by the State and Federal Governments, or it was not so annexed. If it was, the owners had riparian rights under the act; if it was not, the water would not pass upon a conveyance of the lands. As to the swamp lands now in question, it is still more clear that the water did not pass as parcel of the lands upon conveyance by the State, so as to give riparian rights under the saving clause, and entitle the owners to have the water remain there, for the State

was bound by the grant under which it held the lands to have the water, at least the surplus water, removed.

V.

RIGHTS OF THE DEFENDANTS, AS LICENSEES OF THE GOVERNMENT, THE SUPRA-RIPARIAN PROPRIETOR, TO USE THIS WATER FOR IRRIGATION, EVEN UNDER THE RIPARIAN DOCTRINE.

Granting that the plaintiffs are riparian owners upon a continuation of Kern River, and that, as such, they are entitled to all the riparian rights claimed for them in the prevailing opinion, we still most strenuously insist, as we have heretofore insisted, that they cannot maintain this action, because the defendants were acting under a license from the *supra*-riparian proprietor, in the exercise of the undoubted riparian right of irrigation upon the land of such *supra*-riparian proprietor. It appears that the United States is the owner of the riparian land on Kern River upon which the defendants' canal is constructed, and upon which the water is all used. The land constitutes one immense tract of Government land bordering on this stream, and is all riparian land. Its owner, the United States, being a riparian owner, has, under the common law doctrine of riparian rights, laid down by Judge McKinstry, the same right of irrigation, with respect to that land, as any other owner on the stream. That right it can exercise, like any other riparian owner, personally or by its agent, servant, licensee, or proxy. The only limitation is, that the right shall be exercised upon some part of the riparian land, it matters not how far from the stream, provided the use is not unreasonable, and even then, if no damage is proved. The defendants were licensees of the Government, and could divert the water for the same purposes and to the same extent as the

Government, so long as no damage appears. Until then he may even divert all, if the other party cannot prove damages.

The plaintiffs ignore the well-settled rule, that it is only as against one having no riparian rights even in England, that a riparian owner can get an injunction, while confessing that he has not been damaged. This is fully shown in one of the cases which are against us, in Sawyer's Reports, decided by Hillyer, J., where he explains that no prescriptive right can be gained by any lapse of time or continuance of user, by one riparian owner against another not injured or damaged. (*Union etc. Co. vs. Dangberg*, 2 Sawyer, 454, 455.) It is a clear case of *cessante ratione*. The exception, as it were, to the rule that damage or injury must be shown, is based on the idea that if one with no right at all—a mere intruder—is allowed to go on, he may gain a prescription. But here, if the United States licenses us, so long as we act under the license, as against an *infra*-proprietor having no use for the water, no prescription runs. The United States, “as proprietor, * * * has the same property and right in the stream that any other owner of land has, be it usufructuary or otherwise.” (*Union. etc. Co. vs. Ferris*, 2 Sawyer, 179.) Then, as we showed in our former petition for re-hearing, and our brief on re-hearing, that we had an express license from the United States to use this water as we used it, we stand here upon the very premises laid down by Mr. Justice McKinstry in the prevailing opinion, just like any other supra riparian owner using the water. Again, “so being as the plaintiff has enough for its lawful, practical uses, it ought not and cannot be permitted to debar other riparian proprietors from applying so much water as they profitably can to agricultural purposes. (*Union etc. Co. vs. Dangberg*, 2 Sawyer, 454.) It follows that under the position of Mr. Justice McKinstry, the plaintiffs could lose no rights, and the defendants gain none by the use they made of the waters.

VI. PLAINTIFFS' LACHES.

Upon this point it is sufficient to say, that as we understand the opinion, *active* acquiescence for the length of time before suit here shown, would be sufficient to defeat the injunction, but it is said that no active acquiescence was shown. We respectfully refer to our brief on the original hearing, Part II., p. 145 *et seq.*, for citations of the evidence sufficient to demonstrate that in this matter the Court was laboring under a misapprehension of the state of the proofs on this point. Aside from this, we submit that the fact these plaintiffs stood by until within two months before the whole period of the statute of limitations had expired, while the defendants were expending their time, labor, and money in constructing costly works, which must prove valueless if this suit prevails, and that the plaintiffs do not claim that they have been damaged to the extent of a single dollar, must, on general principles of equity procedure, furnish most persuasive reasons against allowing the extraordinary relief of an injunction.

Respectfully submitted,

GARBER, THORNTON & BISHOP.

